

Due Process of Law: After 1890 Anything; Today Everything - A Bicentennial Proposal to Restore Its Original Meaning

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DUE PROCESS OF LAW: AFTER 1890 ANYTHING; TODAY EVERYTHING—A BICENTENNIAL PROPOSAL TO RESTORE ITS ORIGINAL MEANING

*Robert Emmett Burns**

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INTRODUCTION

In 1890, a constitutional coup d'etat occurred. In a single decision, the United States Supreme Court transformed the due process clause of the fourteenth amendment from a phrase requiring equal procedures to an

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unrestrainable mandate giving judges power to review most all state laws touching life, liberty or property. A desperate quest for precedent and direction have led successive Supreme Courts to find rights, liberties and procedures in order to give content to the phrase "due process of law." Contemporary due process is rootless and means anything the court wants it to mean. This article proposes a constitutional amendment to define due process of law and thus restore its original intent and meaning.

I. THE CONSTITUTION AND THE BILL OF RIGHTS: ORIGINAL UNDERSTANDINGS

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses shall be added: And as extending the ground of public confidence in the Government, will best insure the beneficent end of its institution

.....

The Preamble to the Bill of Rights, 1791¹

The colonists' experiences with Mother England forewarned them to avoid the potential tyranny of centralized government. The government created pursuant to the Articles of Confederation provided for no executive or judicial branch, and no central government monopoly on printing money.² The Constitution was ratified, in part, in order to form a "more perfect" Union, with power apportioned between the federal and state governments. Without a written constitution, there was always the potential for clashing sovereignties.³ Only principled construction of the writing could prevent one government from destroying what the other was supposed to preserve.⁴

The Constitution is a document deeply distrustful of central government.⁵ In the Constitution, the important separation was not between the legislative,

1. See H.R. Doc. No. 398, 69th Cong., 1st Sess. 1063 (1926).

2. See C. PRITCHETT, *THE AMERICAN CONSTITUTION* 11 (2d ed. 1968).

3. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall saw the principal problem as one of clashing sovereignties—the tendency of one government to pull down what the other has built up. He described this tension as the "incompatibility of a right in one government to destroy what there is a right in another to preserve." *Id.* at 430. Perhaps this accounts for his modest powers approach. Recent Supreme Courts follow this approach in reviewing the exercise of congressional power over interstate commerce. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the Public Accommodations sections of the 1964 Civil Rights Act under the commerce clause although the real purpose of the measure was to advance social or race relations).

4. See *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851) (subject power analysis).

5. The Constitution placed several checks on Congress's power. For example, Congress cannot appropriate money for armies for longer than two years. Congress can organize the militia, but the power to appoint officers is reserved to the states. U.S. CONST. art. I, § 8.

judicial and executive branches, but between the national government and the states.⁶ Indeed, without free sovereign states, the United States would have been just another government of three branches and thirteen provinces.

The first ten amendments to the Constitution, the Bill of Rights, were enacted to prevent the federal government from extending its powers.⁷ Yet today, the purpose of the Bill of Rights, as expressed in its purpose or preamble clause, lies hidden in convenient obscurity. Perhaps it is nowadays better to forget that the purpose of the Bill of Rights was to *benefit, not restrict*, the powers of state government.⁸

The Bill of Rights was the price exacted by the thirteen states for ratifying the Constitution.⁹ Who could have imagined that these provisions would become selectively adapted or incorporated as a restriction and restraint on those states.

The Supreme Court first asserted jurisdiction to construe the language of the Constitution in *Marbury v. Madison*.¹⁰ The Constitution did not specifically provide for an arbitrator of disputes, and it is not surprising that the Supreme Court made itself the ultimate voice of the Constitution. Nor is there anything too controversial about *McCulloch v. Maryland*,¹¹ in which Chief Justice Marshall discussed the Court's "painful duty" to declare an act unconstitutional where Congress (or the states), under the pretext of executing powers, enacts laws for the accomplishment of objects not entrusted to the federal or state government.¹² However, in *McCulloch*, Justice Marshall added that "were the judiciary to inquire about the degree of the necessity of laws, the Court would pass the line that circumscribes the judicial department" and would tread on legislative ground.¹³ Justice Marshall stated, "This court disclaims all pretensions to such a power."¹⁴

6. See 1 H. VON HOLST, CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 29-30 (1889). The Declaration of Independence spoke of "these United Colonies" as "free and independent states." The Declaration of Independence para. 2 (U.S. 1776) (emphasis in original).

7. See *United States v. Sprague*, 282 U.S. 716, 733 (1931); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1859 (1833).

8. See 2 J. TUCKER, THE CONSTITUTION OF THE UNITED STATES §§ 326-337 (1899).

9. J. JAMESON, CONSTITUTIONAL CONVENTION § 98 (1867).

10. 5 U.S. (1 Cranch) 137 (1803).

11. 17 U.S. (4 Wheat.) 316 (1819).

12. *Id.* at 423.

13. *Id.*

14. *Id.* Marshall's predecessor, Chief Justice Iredell, also claimed constitutional power to void acts of legislatures. However, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), he added:

I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.

Id. at 399.

Throughout Chief Justice Marshall's term, numerous cases involving state court judgments reached the Court.¹⁵ From the beginning, the Court employed the appellate power bestowed on it by the Judiciary Act of 1789¹⁶ to constitutionally validate such review practice.¹⁷ Until the passage of the fourteenth amendment, however, there were few prohibitions or reviewable restrictions in the Constitution that addressed state laws.¹⁸

Prior to the Civil War and the amendments to the Constitution that were passed in its wake, Congress could not abolish slavery because each state was free to grant or deny state citizenship. State citizenship was tied to the rights to own property, contract, give evidence and vote.¹⁹ The Bill of Rights, enacted to "prevent misconstruction of powers" by the federal government, was not binding or applicable to the state governments.²⁰ When Congress attempted to confer federal citizenship to slaves in a newly admitted state, a political Supreme Court struck down the statute in the infamous *Dred Scott v. Sandford*²¹ decision.

To preserve the Union in the aftermath of the Civil War, Congress enacted constitutional amendments to provide the emancipated slaves with the same constitutional rights as whites had enjoyed since 1787.²² Without the four-

15. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212 (1827); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (citing § 25 of the Judiciary Act of 1789, 1 Stat. 73 (1789), as allowing review of final decisions of state courts) (codified as amended at 28 U.S.C. § 1333 (1985)).

16. 1 Stat. 73 (1789).

17. In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), the Court annulled state laws, but only for violation of specific language in the Constitution prohibiting a state's actions.

18. U.S. CONST. art. I, § 10.

19. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422 (1856).

20. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833), Chief Justice Marshall stated: The question [is], we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

Id. at 246-47.

21. 60 U.S. (19 How.) 393 (1856).

22. The thirteenth amendment abolished the institution of slavery. The first clause of the fourteenth amendment conferred on blacks federal citizenship (overruling the *Dred Scott*

teenth amendment, neither Congress nor the Supreme Court had the constitutional power to force states to apply to their black residents the same laws (equal protection) or procedures (due process) as applied to white residents. The Civil War amendments attempted to promise blacks what whites had always had.

Prior to the Civil War, state law was supposed to govern personal civil and common law rights.²³ After the Civil War, Congress could have created amendments to drastically realign this "old" federal balance between the states and the central government. The federal government could have imposed a single will upon the various states, destroying them as separate entities and thereby guaranteeing racial equality. The thirteenth, fourteenth or fifteenth amendments could have provided a constitutional Bill of Rights (under Supreme Court stewardship) as everyone's new privilege and immunity. But this would have mocked the theories of dual citizenship, two constitutions, federal-state power apportionment, reserved rights and stated powers. In short, it would have altered in material, *non-racial* ways the 1787 Union that the Civil War was fought to preserve.²⁴

II. THE *DRED SCOTT* DECISION: SECRET KEY TO DUE PROCESS OF LAW

All trust in Constitutions is grounded on the assurance they may afford, not that the depositories of power will not, but that they cannot misemploy it.

John Stuart Mill²⁵

decision). The second clause of the fourteenth amendment conferred state citizenship upon blacks. The remaining portion of the amendment promised blacks equality in state procedures (due process) and state law (equal protection). See Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U. L. REV. 19 (1938); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479.

Some commentators believe that the fourteenth amendment was never intended to incorporate the Bill of Rights. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 68-132 (1949) (responding to Justice Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947), which espoused incorporation). The handful of justices who felt the fourteenth amendment incorporated the federal Bill of Rights were identified by Justice Douglas in *Gideon v. Wainwright*, 372 U.S. 335 (1963). This view has never commanded a majority. See Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1964).

23. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). In *United States v. Cruikshank*, 92 U.S. 542 (1875), a post-Civil War Supreme Court, speaking of the nature of citizen rights and republicanism, wrote: "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there." *Id.* at 555.

24. In a letter to the New York Tribune in 1862, President Lincoln wrote:

My paramount object in this struggle is to save the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.

New York Times Book Review, Feb. 8, 1987, at 34.

25. H. MENCKEN, *A NEW DICTIONARY OF QUOTATIONS* 214 (1942).

In 1856, the United States Supreme Court for the first time declared an act of Congress in violation of the due process clause of the fifth amendment.²⁶ The *Dred Scott* decision resulted in the Court's invalidation of the portion of the Missouri Compromise that prohibited slavery in certain territories of the United States.²⁷ Before the Civil War, Congress had no power to free slaves because state law governed state citizenship.

Many blacks, however, were state citizens in the northern states. The Missouri Compromise, a desperate measure to avoid the death knell of the Union, sought to restrict the spread of slavery by allowing the new state of Missouri to be slave while prohibiting slavery in certain territories of the United States. Congress passed the Missouri Compromise under its law-making power. Due process of law, however, was used to strike down the law itself, not the process by which the law was enacted.

Dred Scott was a Missouri slave who was taken into a free state, Illinois, and then to a territory where the Missouri Compromise prohibited slavery. Several years after his return to Missouri, Scott sued for his freedom, which he claimed through his residence in Illinois and the Louisiana territory. In rejecting Scott's claim, the Supreme Court held that slaves were not citizens for federal purposes, but rather "property."²⁸ The Court reasoned that Congress could pass no law depriving citizens of property without due process. The Missouri Compromise violated due process of law.²⁹ Chief Justice Taney wrote, "[T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law."³⁰ The Chief Justice noted that for federal constitutional purposes, Scott was "property" and not a citizen. An act of Congress legislating to the contrary, therefore, deprived Scott's owner of his property interest in Scott without "due process of law."³¹

26. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

27. *Id.* at 455 (Wayne, J., concurring).

28. *Id.* at 453.

29. *Id.* at 455 (Wayne, J., concurring). Von Holst, author of a seven volume pre-Civil War constitutional and political history of the United States, called the *Dred Scott* decision "an invalid usurpation" and "an absurd and bold assumption, and morally . . . an unparalleled prostitution of the judicial ermine." 6 H. VON HOLST, *supra* note 6, at 46.

30. 60 U.S. (19 How.) at 450. Many state constitutions borrowed the phrase "due process" in their documents. In Massachusetts, the phrase used was "according to the law of the land." In those states, judges could set out common judge-made rules of due process in criminal and civil matters, but legislation overriding the judges was also due process and entitled to supremacy. See Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911). "Indeed the great office of statutes is to remedy defects in the Common Law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1871).

31. 60 U.S. (19 How.) at 450. See also *Wynehamer v. New York*, 13 N.Y. 378 (1856); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 475 (1911).

When taught in law school, the sole emphasis given *Dred Scott* is its holding that slaves were mere property. The real significance of the *Dred Scott* decision is that it is the first "substantive due process" case where the Supreme Court construed due process to mean not *procedures*, but instead utilized review "magic" to strike *the merits* of a duly enacted law. *Dred Scott* was overruled by the first sentence of the post-Civil War fourteenth amendment that reads "all persons born or naturalized in the United States . . . are citizens of the United States" ³²

III. COUP D'ETAT: DUE PROCESS IN 1890 BECOMES THE JUDGES

The great question which, in all ages, has disturbed mankind and brought on them the greatest part of those mischiefs which have ruined cities, depopulated countries and disordered the peace of the world, has been whether there is power in the world, not whence it came, but who should have it.

John Locke³³

In *The Federalist Papers*, Madison warned that if the judicial power were "joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be *the legislator*."³⁴ This is precisely what happened through application of substantive due process. The United States Supreme Court possesses ultimate power to command Congress, the executive or states on just about any subject respecting life, liberty or property. In one decision in 1890,³⁵ the Supreme Court transformed the due process clause from a recognition of Congress's powers over its own procedures to a grant of legislative power to the supreme judiciary. This coup d'état occurred so that the Supreme Court could review the adequacy of petty state railroad rate regulation in the post-industrial revolution years of 1890 to 1900. To obtain the power, the Court changed

32. U.S. CONST. amend. XIV.

33. J. LOCKE, TREATISE OF GOVERNMENT (1690).

34. THE FEDERALIST No. 47, at 247 (J. Madison) (M. Beloff ed. 1948) (emphasis in original). Madison takes great pains to point out that in England (and certain colonies) judges were part of the legislative Parliament (House of Lords). The Constitution's separation of powers doctrine was completely different:

The reasons on which Montesquieu grounds his maxim, are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Again, "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*."

Id. (emphasis in original).

35. Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890). See *infra* notes 62-65 and accompanying text.

the meaning of a curious British phrase called "due process of law."

The phrase "due process of law" comes from an early English statute that read, "no man of what Estate or Condition that he be, shall be put out of Lands or Tenements, nor taken nor imprisoned, nor disinherited, nor put to Death, without being brought in answer by Due Process of the Law."³⁶ This statute in turn is based on Chapter 39 of the *Magna Carta*, which the Massachusetts Constitution of 1780 paraphrases as, "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land."³⁷

In the 17th century, an English jurist, Sir Edward Coke, found a very convenient use for this phrase to resolve a problem in his own day: was the King a divine-right law unto himself or under the law? In one of the struggles for supremacy between the King and Parliament in 1612, the question arose whether the King could order the arrest of a free man without assigning a reason for it. It was Coke's contention that law should not be governed by the arbitrary will of the King, but by precedent and traditions like the *Magna Carta*.³⁸ The *Magna Carta* required the King to conform according to the law of the land (*per legem terrae*) which, by custom, required notice, a hearing, reasons, and in short, due process of law.³⁹

Coke held that no man was above the law, for law was reason.⁴⁰ He stated that reason was precedent and precedent was the *Magna Carta*, which said that a man could not be deprived of liberty except *per legem terrae* (according to the law of the land), or after due process of law.⁴¹ At the time of Coke's decision, it was not clear whether the King or Parliament (of which the judiciary was to become part) was to be the supreme sovereign law-giver. After Parliament became supreme, Coke would, as judge, rule that nobody

36. 24 Edw. 3, c. 3 (1354).

37. Declaration of Rights, Art. XIII.

38. See Corwin, *supra* note 30, at 369-70.

39. The United States Constitution had provided in its fifth amendment that no man was to be deprived of life, liberty or property without "due process of law." The issue was, however, what agency or government was to legislate meaning or substance to due process. The definition of due process is a function of will or law-making. Whether the state has acted according to due process is a judicial question of judgment, intention, reason, and dispute resolution. Due process meant that notice, fair procedures or hearings should be provided before taking an individual's life, liberty, or property. In England at the time of the *Magna Carta*, King John, rather than Parliament, was probably the lawmaker. In our country, Congress and the states were to be the law-makers. We, however, borrowed a phrase from a non-constitutional country that for five hundred years had convulsed with uncertainty whether mad kings, parliaments, dictators or judges were the law-givers.

40. See Corwin, *supra* note 30, at 369-70.

41. For a decision of the relationship between due process and the *per legem terrae*, see Corwin, *supra* note 30, at 369.

could overrule Parliament.⁴² Today the English Parliament is both lawmaker (legislator) and enforcer (judge). The law Parliament enacts as legislator is the law the judges of Parliament interpret and enforce as adjudicators. Coke's equation of due process with law of the land prevented the King from determining what due process was. The fifth amendment of the United States Constitution provides that no person may be deprived of life, liberty or property unless afforded "due process of law."⁴³ Due process meant merely that notice, fair procedures or hearings should be provided before laws could deprive one of life, liberty or property.⁴⁴

After the Confederacy lost the Civil War in 1865, Congress enacted the thirteenth, fourteenth and fifteenth amendments to provide recently freed slaves with a guarantee of equality in state laws and procedures. The thirteenth amendment abolished slavery. The fourteenth amendment gave federal citizenship and the equal protection of state laws to all citizens. The fifteenth amendment guaranteed the right to vote. The purpose of the fourteenth amendment was to ensure that all states, especially those in the Old South, afforded the new black citizens equality in state law (equal protection) and state procedure (due process).⁴⁵

The *Slaughter-House Cases*⁴⁶ of 1873 were the leading post-war cases construing the meaning of the war amendments. It was first argued in those cases that the amendments meant more than "black is white." Counsel for appellant, John Campbell, a former Supreme Court Justice who sat on the infamous *Dred Scott* Court, argued that the fourteenth amendment provided something for everyone, including new privileges and immunities from state government.⁴⁷ The Supreme Court rejected any notion that the fourteenth amendment privileges and immunities clause incorporated new rights.⁴⁸

Justice Miller wrote the majority decision.⁴⁹ He saw the danger of giving petitioner's slaughter-house business some kind of new federal privilege of immunity under the fourteenth amendment. Justice Miller noted that construing the fourteenth amendment to permit the Court to incorporate things:

would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify

42. *Id.*

43. U.S. Const. amend. V.

44. Alexander Hamilton has written: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice." 3 A. HAMILTON, HAMILTON'S HISTORY OF THE REPUBLIC 207-08 (1801).

45. See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 1972 WASH. U.L.Q. 421, 432-43.

46. 83 U.S. (16 Wall) 36 (1873).

47. *Id.* at 55. As Campbell stated, privileges and immunities are "undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country." *Id.*

48. *Id.* at 77-78.

49. *Id.* at 36.

such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment . . . [I]t radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . .⁵⁰

The *Slaughter-House* decision left the privileges and immunities clause with its original intent and purpose. The due process clause of the fourteenth amendment was, at first, ignored as an ultimate restraint on creative state governments.⁵¹ All the due process clause was thought to do was provide that blacks received the same notice, hearing or state procedures enacted for whites.

Not every interest was satisfied by interpreting the fourteenth amendment to refer only to race. In an age of moguls, combines, trusts and mergers, businessmen felt they needed judicial protection from the oppressive police power regulation left to the states by the Union of 1787. Interstate incorporators were determined to use the new race amendments for their own purposes. Though it was established that federal judicial review of state legislation was limited to express provisions of the Constitution (mostly the no impairment of contract clause), special interests would not be deferred.

In the *Slaughter-House Cases*, Campbell argued that national citizenship and state citizenship had, by force of the amendments, become the same. Perhaps Campbell evoked this potentially broad interpretation of the fourteenth amendment in protecting the rights of blacks so that the Court would curtail the fourteenth amendment.⁵² Blacks did not get the benefits they were promised in 1868. The race amendments of 1868 would instead become derailed.

In *Davidson v. New Orleans*,⁵³ decided in 1877, Justice Miller wrote that an individual is accorded due process of law "when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."⁵⁴ Miller, however, acknowledged just what Court petitioners were up to then, as now, when he wrote:

But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of

50. *Id.* at 78.

51. *Id.* at 77.

52. R. LOGAN, *THE BETRAYAL OF THE NEGRO* 149 (1965).

53. 96 U.S. 97 (1887).

54. *Id.* at 105.

bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.⁵⁵

In *Munn v. Illinois*,⁵⁶ the Supreme Court reviewed the right of Illinois to fix maximum state charges for the storage of grain. This legislation restricted the freedom of the Chicago grain monopoly. The Court in *Munn* upheld the state law. Property affected with a public interest had always been subjected to lawmaker's regulation.⁵⁷ Settled canons of constitutional construction left the Supreme Court no constitutional occasion to question the reason or the ill wisdom in the exercise of constitutionally-allocated power.⁵⁸

Justice Field, a former railroad attorney, dissented in *Munn v. Illinois* and also dissented in the *Slaughter-House Cases*. Field's objective was to procure for the judiciary the power to review state legislative enactments affecting private property interests on a sweeping basis.⁵⁹ Evidencing the same attitude, Mr. C. Marshall wrote an article in the *American Law Review* calling for a constitutional amendment to overrule *Munn* as "contrary to the spirit of our age and the character of our institutions."⁶⁰ Though Marshall conceded the accuracy of *Munn's* legal tradition, he pined for what in a few years would be the opinion of a majority of the Court: "Is there an institutional spirit, existing as a part of our law, but unexpressed in constitution or in statute, which a state or federal judge can claim as controlling authority and which he may invoke against the legislative power?"⁶¹

A constitutional amendment to expand the fourteenth amendment was never proposed. Instead a coup d'état occurred, for in 1890 the Court decided *Chicago, Milwaukee and St. Paul Railway v. Minnesota*.⁶² This decision alone changed the review standard under the due process clause from whether the state complied with procedures to whether in the opinion of the United States Supreme Court the law under review was reasonable. The Court held,

55. *Id.* at 104.

56. 94 U.S. 113 (1876).

57. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1887).

58. As the Supreme Court stated in *Munn*:

We know that this [rate of charge of service for use of public property] is a power which may be abused; but there is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts For us the question is one of power not of expediency.

94 U.S. at 134.

Munn v. Illinois was in the great tradition of Chief Justice Marshall, who had written, in *Brown v. Maryland*, "Questions of power do not depend upon the degree in which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." 25 U.S. 419, 439 (1827).

59. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 98 (1873).

60. Marshall, *A New Constitutional Amendment*, 24 AM. L. REV. 908, 913 (1890).

61. *Id.* at 914.

62. 134 U.S. 418 (1890).

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."⁶³ In one fell swoop, the Court assumed the power to review legislative enactments on the basis of a new due process. The Court would determine whether lawmakers' acts violated a due process which reviews substance, not process, and forbids arbitrary, capricious, oppressive, or unfair legislation touching any subject of life, liberty or property.

Justice Bradley, in his dissenting opinion in *Chicago, Milwaukee and St. Paul Railway v. Minnesota*, saw the consequence of the majority view:

They say in effect . . . that the final tribunal or arbitrament is the judiciary There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature⁶⁴

As early as 1909, the prestigious Edwin S. Corwin saw the implications of this new due process:

The truth is that the moment the court in its interpretation of the 14th Amendment left behind the definite, historical concept of "due process of law" as having to do with the enforcement of law and not its making, the moment it abandoned, in its attempt to delimit the police power of the state, its ancient maxim that the possibility that a power may be abused has nothing to do with its existence, that moment it committed itself to a course that was bound to lead, however, gradually and easily, beyond the precincts of judicial power, in the sense of the power to ascertain the law, into that of legislative power which determines policies on the basis of facts and desires.⁶⁵

It was once settled doctrine that the Supreme Court, when reviewing the constitutionality of state legislation in reserved or police matters, such as health, safety or crime, would ask only whether the questioned act bore a relationship to the state's police power. The Court would rule only if the state had the power and not whether its exercise was capricious, unreasonable or arbitrary.⁶⁶ The founding fathers, after all, had rejected a council of

63. *Id.* at 458 (emphasis added).

64. *Id.* at 465 (Bradley, J., dissenting).

65. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1909).

66. Even Marshall's successor, Chief Justice Taney (author of the *Dred Scott* decision), seemed clear enough about state power prerogatives:

But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions

revision to improve or veto lawmakers.⁶⁷ After 1890, the question for due process review became whether the acts were rational, capricious, arbitrary, invidious, or offensive to various natural law formulae, none of which are found in the Constitution.⁶⁸

There are several theories as to how "due process" was given substantive content. Charles Beard believed that a conspiracy had occurred.⁶⁹ He wrote that two railroad congressmen, Roscoe Conkling and John Bingham, had deliberately inserted the phrase "due process" into the fourteenth amendment so that courts would not be limited merely to protecting the colored race, but would also be able to protect non-racial property or laissez-faire capitalism from state regulation.⁷⁰ In his work on American civilization, Beard wrote:

By a few words skillfully chosen every act of every state and local government which touched adversely the rights of persons and property was made subject to review and liable to amendment by the Supreme Court at Washington, appointed by the President and Senate for life and far removed from local dealings and prejudices Thus, the triumphant Republican minority, in possession of the federal government, and the military power, under the sanction of constitutional forms, subdued the states for all time to the unlimited jurisdiction of the federal Supreme Court.⁷¹

The late Professor Louis B. Boudin rejected Beard's version of the due process clause.⁷² Boudin attributed the due process revolution to both Democratic judges and Republican appointees, each anxious to protect, by judicial action, invested capital.⁷³ Boudin asserts that after Justice Field failed in the *Slaughter-House Cases*, he turned to due process in his dissenting opinion in *Munn v. Illinois*. Boudin further notes that due process "had hitherto

. . . . And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade. Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power.

License Cases, 46 U.S. (5 How.) 504, 583 (1847).

67. 1 ANNALS OF CONG. 51, 64, 76, 87 (J. Gales ed. 1789).

68. A commentator has noted:

Here the convention is simply that there must be a text for any assertion of the power of judicial review. Going without a text is like going naked. . . . *Writtenness* plays a central part in our constitutional tradition. A judge without a text is not only streaking, if you will, he is usurping.

Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143, 145 (1981) (emphasis in original).

69. 2 C. BEARD, THE RISE OF AMERICAN CIVILIZATION 111-14 (1930).

70. *Id.* at 112-13.

71. *Id.* at 113-14.

72. Boudin, *supra* note 22, at 24-25.

73. *Id.* at 19.

gone practically unnoticed and was therefore a *tabula rasa*, or the empty tablet, into which the Supreme Court could write anything it pleased."⁷⁴ Boudin contended that Justice Field, in his dissenting opinion in *Munn*, sought to give the due process clause a revolutionary meaning, by making that clause perform the service which the majority of the Supreme Court had said could not be performed by the privileges and immunities clause. Boudin concluded that though Justice Field's first attempt in *Slaughter-House* was a failure, in the next twenty years he succeeded in making the Supreme Court the arbiter of the whole range of our national economy.⁷⁵ After 1890, the constitutional phrase due process of law would mean more than mere process.⁷⁶

In Lord Coke's day, the supremacy of one king over most men was overcome by a fundamental law higher than all men.⁷⁷ In poetic irony, the American democracy became overrutable by fundamental law determined by five to nine judges. Lord Coke's due process of law consisted of restraint, static precedent and binding tradition.⁷⁸ Due process in America became instead an escape from a written constitution, a mandate for change. Charles Evans Hughes, later Chief Justice, would say in 1907 that "we are under a Constitution but the Constitution is what the judges say it is."⁷⁹

74. *Id.* at 77.

75. *Id.* at 77. A perspicacious remark of Justice Miller, author of the *Slaughter-House* and the *Davidson* decisions, is quoted in E. BATES, *THE STORY OF THE SUPREME COURT* (1936):

It is vain to contend the judges who have been, at the bar, the advocates of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence.

Id. at 205.

76. In 1887, Justice Miller, in *Davidson v. New Orleans*, 96 U.S. 97 (1887), wrote in construction of the due process clause of the fourteenth amendment: "It is not possible to hold that a party . . . when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." *Id.* at 105.

In *Kennard v. Louisiana ex rel Morgan*, 92 U.S. 480 (1875), the Court, in a post-Civil War due process state case, wrote: "Our authority does not extend beyond an examination of the power of the courts to proceed at all." *Id.* at 481. Justice Miller found in *Davidson* that there was due process "whenever by the laws of the state" (authorizing a public taking) there was notice and trial. 96 U.S. at 104-05. *Accord* *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). The difference in approach to due process before and after 1890 is dramatized by *Davidson*, where public takings "cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objection." 96 U.S. at 105.

77. See Corwin, *supra* note 30, at 369.

78. See E. BATES, *supra* note 76, at 205 n.1.

79. See H. MENCKEN, *supra* note 25, at 215. After 1890, the Court became "flexible." Between 1888 and 1918, approximately 725 cases were decided under the fourteenth amendment, usually turning on the due process clause. E. BATES, *supra* note 75, at 205 n.1. Between 1879 and 1928, the Supreme Court used the fourteenth amendment to declare 220 police power statutes unconstitutional. See *THE CONSTITUTION OF THE UNITED STATES, ANALYSIS & INTERPRETATION* 1418-70 app. (E. Corwin ed. 1964).

IV. DUE PROCESS DEFINES REASONABLENESS (1890-PRESENT)

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Justice Iredell⁸⁰

In 1890, the Supreme Court first construed the due process clause of the fourteenth amendment to forbid states from depriving individuals of economic liberties⁸¹ whenever the Court found the law unreasonable. This liberty version of due process of law is sometimes referred to as substantive due process.⁸² Let us call it the reasonableness test. After due process was construed to require reasonableness, the Supreme Court had the power to invalidate any state law regulating liberty or property that it considered arbitrary.

The reasonableness test of due process is supposedly out of fashion. A typical disclaimer in this area might include Justice Black's dissent in the 1969 case of *Tinker v. Des Moines School District*.⁸³ *Tinker* held an Iowa school's regulation banning the wearing of armbands in protest of the Vietnam War unconstitutional. Justice Black observed:

There was at one time a line of cases holding "reasonableness" as the court saw it to be the test of a "due process" violation The *Ferguson* case [*Ferguson v. Skrupa*, 372 U.S. 726 (1963)] totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience" . . . or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept

80. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798). See *supra* note 14.

81. From 1890 to 1937 the Court struck down as capricious, arbitrary or unreasonable, numerous state and federal laws that regulated business liberty. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (statute forbidding mining struck down); *Adams v. Tanner*, 244 U.S. 590, 597 (1917) (employment agency regulation overruled); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (prohibition of yellow-dog labor contracts struck down); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (maximum hours overruled); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (regulation of insurance companies overruled).

82. In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court spoke not merely of the physical liberty of the person (corporation), but of the liberty to be free in the employment of one's faculties and livelihood, including the liberty of contract that was necessary, proper or essential to carrying out these purposes. *Id.* at 589.

Most commentators identify the *Allgeyer* decision as the first "reasoned decision actually holding that the substance of economic legislation violated the due process clause." W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 434 (5th ed. 1980).

83. 393 U.S. 503 (1969).

on the ground that it gives judges power to strike down any law they do not like.⁸⁴

The reasonableness test of due process has by no means disappeared. Newer restrictions on laws dealing with speech, assembly, religion or privacy must be reasonable to pass constitutional muster.⁸⁵ Today's liberties of privacy, speech, autonomy, family living or sexual preference are conditioned by the 1890 mandate of substantive due process.⁸⁶ In *Truax v. Corrigan*,⁸⁷ Chief Justice Taft determined that the "fundamental principles of right and justice" in the fourteenth amendment commanded the issuance of an injunction sought by a property owner to enjoin peaceful picketing at his place of business. Nineteen years later, in *American Federation of Labor v. Swing*,⁸⁸ the same conduct was measured by the due process clause. However, at the hands of a different majority, the Court did not command, but rather forbade constitutional relief.⁸⁹

A more recent and controversial discovery, in *Roe v. Wade*,⁹⁰ that liberty and due process guaranteed the right to a first trimester abortion has no

84. *Id.* at 519-20 (Black, J., dissenting). See also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) (Court upheld a statute requiring employers to pay for time employees spent voting).

85. Commercial speech, symbolic speech, press coverage rights, lobbying, communication access or promotional advertising by an electric utility inevitably requires a weighing of countervailing federal and state interests. As Mendelson wrote on the first amendment and the judicial process, "Balancing seems to me the essence of the judicial process—the nexus between abstract law and concrete life . . . Surely the choice is simply this: shall the balancing be done 'intuitively' or rationally." Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 481-82 (1964).

In the religion area, courts strive to strike a rational balance between the establishment clause and the free exercise clause. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

86. See G. GUNTHER, CONSTITUTIONAL LAW (10th ed. 1980). For example, in *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970), the Court held:

[W]e believe that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests . . . We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability to enjoy their liberty. As the court stated in *Union Pacific Railway v. Botsford*, 141 U.S. 250, 251 (1891): "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Id. at 1284-85.

87. 257 U.S. 312 (1921).

88. 312 U.S. 321 (1940).

89. *Id.* at 326.

90. 410 U.S. 113 (1973).

more textual basis than the discredited *Lochner* Court's finding of a liberty to operate a sweat shop.⁹¹ It matters little whether "liberty" is economic or spiritual. The important and dispositive issue in determining whether there has been a violation of due process is whether the taking of that liberty is a reasonable deprivation in the opinion of a Supreme Court majority.⁹² As the due process clause's very scope continues to expand, a reasonableness requirement still remains. In some areas, the burden of proving that laws are reasonable will be relaxed or embellished, depending on the liberty involved and the values of the judge. The governing standard of reasonableness remains, however, as the benefit of an 1890 Supreme Court decision that changed the meaning of the words due process of law from required procedures to anything, and eventually everything.

V. DUE PROCESS SELECTIVELY AMENDS TO STATES SOME FEDERAL BILL OF RIGHTS (1897-PRESENT)

We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the states any of the provisions of the first eight Amendments as such.

The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States.

Justice Frankfurter⁹³

Despite this statement, and numerous others like it, the Court's construction of the due process clause belies its own holdings.⁹⁴ In *Chicago, Bur-*

91. *Lochner v. New York*, 198 U.S. 45 (1905). See *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169 (1986).

92. See Graglia, *Judicial Review on the Basis of "Regime Principles": A Prescription for Government by Judges*, 26 S. Tex. L.J. 435 (1985). The laws could be school regulations or even a liberty to refuse anti-psychotic drugs in a state hospital. See, e.g., *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969) (dress code requiring short hair violated the fourteenth amendment's equal protection clause). Assuming that Miller had a right to wear his hair long while attending public school, the test which we must apply to determine the validity of the hair regulation is that set out by Chief Justice Hughes in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937): "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." *Id.* at 391.

93. *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959).

94. See *Bute v. Illinois*, 333 U.S. 640, 656 (1948) ("After exhaustive consideration of the subject, this Court has decided that the Fourteenth does not, through its due process clause or otherwise, have the effect of requiring the several states to conform . . . to the precise procedure of the federal courts . . . or Bill of Rights"); *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904) ("It is well established that the first eight articles of the amendments . . . have reference to powers

lington & Quincy Railroad v. Chicago,⁹⁵ the city of Chicago condemned a railroad right-of-way in order to widen a public street. The defendant received notice and an opportunity to be heard at the condemnation hearing. The Illinois Constitution required the payment of compensation for the taking of property for public uses.⁹⁶ The jury awarded the railroad one dollar. Not satisfied with the award in the state court, the railroad appealed to the United States Supreme Court, seeking a determination of "[t]he circumstances under which the final judgment of the highest court of a state in a proceeding instituted to condemn such property for public use may be reviewed by this court."⁹⁷ The Supreme Court in 1897 held that the due process clause of the fourteenth amendment prohibited states from taking property from private persons without just compensation.⁹⁸ Thus, for the first time, a clause in the federal Bill of Rights was incorporated into the due process clause of the fourteenth amendment. When due process was defined to mean "no taking without just compensation," the Supreme Court obtained massive new jurisdiction to determine what state laws constituted a "taking" and whether payment, if any, was just.⁹⁹

exercised by the government of the United States, and not to those of the States"); *Bollen v. Nebraska*, 176 U.S. 83, 88 (1900) ("This court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal courts"); *Brown v. New Jersey*, 175 U.S. 172, 174 (1899) ("The first Ten Amendments . . . contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government"); *Eilenbecker v. Plymouth County*, 134 U.S. 31, 34 (1890) ("the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States"); *Spies v. Illinois*, 123 U.S. 131, 166 (1887) ("The first ten articles of amendment were not intended to limit the powers of the States").

95. 166 U.S. 226 (1897).

96. *Id.* at 228.

97. *Id.* at 233.

98. *Id.* at 236.

99. *Id.* The process of reading into the fourteenth amendment the restrictions of the Bill of Rights is called "incorporating" into due process selected phrases and amendments. Once any clause becomes incorporated, the Supreme Court obtains new jurisdiction to review all state cases relating to the rights incorporated. All state courts, and every town in America, must thereafter respect on a uniform basis the Supreme Court's construction of the incorporated subject area. In 1897, the Court paused before incorporating into due process the fifth amendment right to just compensation for state takings. This new jurisdiction was accomplished through the affirmation of a state verdict, and resembles *Marbury v. Madison*, where Justice Marshall granted President Jefferson his appointment and simultaneously obtained the power to construe the Constitution for the Supreme Court. The taking clause had been reviewed only twenty years before in *Davidson v. New Orleans*, 96 U.S. 97 (1877), where the Supreme Court wrote:

It may violate some provisions of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraint on the states in that regard, if private property be taken for public use without just compensation, it must be remembered that when the Fourteenth Amendment was adopted the provision in that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out and this was taken.

Id. at 105.

The second expansion of due process occurred in *Gitlow v. New York*.¹⁰⁰ Justice Sanford, while casually affirming a World War I pamphleteer's conviction under a New York anarchy statute, noted:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the due process clause of the Fourteenth Amendment from impairment by the States¹⁰¹

Thus, in dicta (because the Court nevertheless affirmed Gitlow's conviction) and without mention of contrary rulings, which in Justice Sanford's words “so frequently held as not to warrant citation,” the first amendment was incorporated through the due process clause. In one short sentence, fourteenth amendment due process meant speech rights in states, thereby giving the Supreme Court immense new power.

Liberty originally meant freedom from physical restraint.¹⁰² After the coup d'état, the Court would speak not merely of the physical liberty of the person or corporation, but of the “liberty to be free in the employment of the faculties, including liberty of contract necessary, proper or essential to successfully carry out these purposes.”¹⁰³ In 1925, Charles Warren predicted that succeeding Courts would eventually incorporate the whole Bill of Rights into due process.¹⁰⁴ Warren wrote, “The word liberty seemed an especially convenient vehicle into which to pack all kinds of rights.”¹⁰⁵

100. 268 U.S. 652 (1925).

101. *Id.* at 666. Three years before *Gitlow*, the Court had written in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922), “but as we have stated neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about ‘freedom of Speech’ or the ‘liberty of silence.’” *Id.* at 543.

102. See Shattuck, “Liberty,” *The True Meaning of the Term in those Clauses in the Federal and State Constitutions which Protect “Life, Liberty and Property”*, 4 HARV. L. REV. 365 (1891). Another commentator has noted:

The phrase, “life, liberty or property without due process of law” came to us from the English common law . . . the word “liberty” meant simply “liberty of the person,” or, in other words the right to have one's person free from physical “restraint.” It did not include all a person's civil rights. It was not, in any way, the equivalent of “privileges and immunities.” When the American States embodied the Bills of Rights in their early Constitutions, from 1780 to 1787, substantially every State inserted a provision that no person should be deprived of his life, liberty or property “without due process of law,” or except “by the law of the land.” There is no intimation in legal or historical documents of those days that this phrase in the Bill of Rights in those early State Constitutions meant anything more than it meant at common law—in other words, the “liberty,” so referred to, meant “freedom from physical restraint of the person.”

Warren, *The New “Liberty” under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1925) (footnotes omitted).

103. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

104. Warren, *supra* note 102, at 460.

105. *Id.* at 439.

The *raison d'être* of the rights incorporation process did not come until twelve years after the first amendment speech guarantees were made an implicit "fundamental" right of due process of law. In 1937, Justice Cardozo described this strange pursuit in *Palko v. Connecticut*.¹⁰⁶ Cardozo wrote, "Whatever would be a violation of the original Bill of Rights (amendments I to VIII) if done by the federal government is now unlawful by force of the Fourteenth Amendment phrase due process if done by a state."¹⁰⁷ Cardozo refused to accept total incorporation of the Bill of Rights. Only those Bill of Rights provisions "rooted in the tradition and conscience of our people" would be made binding on states. In affirming a state conviction for murder over a double jeopardy claim, Cardozo asked: "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"¹⁰⁸

Cardozo's standard for determining whether a federal right or liberty would be incorporated into due process was whether the particular liberty was "implicit in ordered liberty." A Constitution is supposed to be explicit. Double jeopardy was not fundamental in 1937 but became so in 1969 when the Warren Court overruled *Palko*.¹⁰⁹ One might wonder why double jeopardy was not at the base of all our civil and political institutions in 1937, or even 1967, but became so in 1969.¹¹⁰

The separation of church and state clause was incorporated in a series of state cases in the 1930's-1940's.¹¹¹ A "watered down" search and seizure fourth amendment was incorporated into due process in 1949 without the exclusionary rule.¹¹² Twelve years later, in *Mapp v. Ohio*,¹¹³ the exclusionary rule was incorporated into due process. The *Mapp* decision gave the Supreme Court power to determine what is a "reasonable" search for every court and hamlet in the country.

Some rights in the Bill of Rights, like the right to an indictment, the right to bear arms, or the seventh amendment right to a civil jury have never been incorporated into due process.¹¹⁴ The evolution of decisions interpreting the fifth amendment self-incrimination clause demonstrates that the due

106. 302 U.S. 320 (1937).

107. *Id.* at 323.

108. *Id.* at 328.

109. *Benton v. Maryland*, 395 U.S. 784 (1969).

110. Double jeopardy has not been construed to disallow successive prosecutions by state and federal government for the same conduct or offense.

111. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Stromberg v. California*, 283 U.S. 350 (1931).

112. *Wolf v. Colorado*, 338 U.S. 25 (1949).

113. 367 U.S. 643 (1961).

114. *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 557 (1874).

process incorporation analysis is only slightly less arbitrary than the 1890 Court's reasonableness test.

The fifth amendment privilege against self-incrimination was made applicable to the federal government only by the amending Bill of Rights of 1791.¹¹⁵ Four of the original thirteen states did not preface *their* constitutions with a separate bill of rights.¹¹⁶ None of these four secured the fifth amendment phrase "nor shall any person be compelled in any criminal case to be a witness against himself."¹¹⁷ After the passage of the fourteenth amendment, the Bill of Rights was repeatedly held inapplicable to the states.¹¹⁸ The Supreme Court, in *Twining v. New Jersey*, held that the privilege against self-incrimination was not fundamental, and thus inapplicable to the states.¹¹⁹ Forty years later, Justice Frankfurter would write, in a five-to-four decision, that the matter "no longer called for discussion."¹²⁰ Then in 1964, the privilege of freedom from self-incrimination became, by a five-to-four vote, one of the "principles of a free government."¹²¹ Such are the fruits of a coup d'etat due process without roots.

VI. DUE PROCESS REVIEWS CONGRESS

The current conception of due process has caused more havoc than has any other constitutional doctrine. It has doomed workmen's compensation, minimum wages, regulation of the hours of labor, regulation of various kinds of businesses, the establishment of railroad pensions, and a great variety of taxes. It is time the original meaning of the phrase, a purely procedural one, be restored.

Osmond K. Fraenkel¹²²

115. In *Barron v. Baltimore*, 32 U.S. (7. Pet.) 242 (1833), Chief Justice Marshall remarked: "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." *Id.* at 249.

116. Of the four states that did not preface their constitutions with a separate bill of rights (New Jersey, New York, Georgia, and South Carolina), none secured the right against self-incrimination. See L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 405-522 (1968); 8 J. WIGMORE, *EVIDENCE* § 2250 (1940).

117. *Id.*

118. *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Bute v. Illinois*, 33 U.S. 640 (1948); *Lloyd v. Dollison*, 194 U.S. 445 (1904); *Bollen v. Nebraska*, 176 U.S. 83 (1900); *Brown v. New Jersey*, 175 U.S. 172 (1899); *Eilenbecker v. Plymouth County*, 134 U.S. 31 (1890); *Spies v. Illinois*, 123 U.S. 131 (1887).

119. 211 U.S. 78, 114 (1908) ("If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands").

120. *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

121. In *Malloy v. Hogan*, 378 U.S. 1, 9 (1964), the Court stated, "In thus returning to the *Boyd* view that the privilege is one of the 'principles of a free government,' *Mapp* necessarily repudiated the *Twining* concept of the privilege as a mere rule of evidence." (Citation and footnotes omitted).

122. Fraenkel, *The Value of Judicial Review*, 141 *NATION* 42 (1935).

In 1890, due process became applicable to all state laws, not just those concerned with race and procedure. Thereafter, conservative Supreme Courts began to invalidate state social legislation in a wide variety of areas including mine safety, minimum working hours for women and children, and union labor laws.¹²³ When the federal government attempted to enact the same kind of social legislation using congressional law-making power it met a wall of frost by construction of the fifth amendment due process clause,¹²⁴ a phrase always binding on the federal government. The Supreme Court then began to use fourteenth amendment due process cases as precedent for fifth amendment due process review. The Court considered the two due process clauses so similar that it cited state cases arising under the fourteenth amendment with federal cases under the fifth amendment without distinguishing between the two clauses.¹²⁵

Due process nearly killed the New Deal, as the National Recovery Act, the Agricultural Adjustment Act and the Guffey Coal Bill were declared unconstitutional in quick succession.¹²⁶ The conservative members of the Court were unable to perceive the reasonableness of statutes regulating health, safety, wages and hours. Congress was so frustrated that a law was proposed which would have provided for automatic impeachment of any Supreme Court Justice who voted to declare an act of Congress unconstitutional.¹²⁷ President Roosevelt threatened to pack the Court in order to out-vote the conservative members and force change or retirement. This was similar to the threats made in early twentieth-century England to increase the membership of the House of Lords if it continued to veto measures of the popularly elected House of Commons.¹²⁸ A switch in nine came just in time.

123. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 402-03 (1922) (overruling state mining safety regulations); *Adams v. Tanner*, 244 U.S. 590, 596-97 (1917) (overruling employment agency regulation); *Coppage v. Kansas*, 236 U.S. 1 (1915) (overruling prohibition of yellow-dog labor contracts).

124. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923); *Adair v. United States*, 208 U.S. 161, 172 (1908). See also *Barley v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (an unsuccessful effort to use the Federal taxation power to regulate child labor in the states). Most of the commerce clause cases from 1910-1927 were also attacked as unfair and unreasonable violations of liberty and due process. See Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927).

125. See, e.g., *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (Justice Black refers to discredited *Adair-Coppage* line of cases, though one is federal and the other a state case). See also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-25 (1952) (Justice Douglas disparaged the activist liberty of contract line of cases).

126. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (declaring National Recovery Act unconstitutional); *United States v. Butler*, 297 U.S. 1 (1935) (declaring Agricultural Adjustment Act unconstitutional); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (declaring Guffey Coal Bill unconstitutional).

127. See Note, *Shall Due Process of Law be Abolished*, 58 AM. L. REV. 290, 291 (1924).

128. The Parliament Act of 1911 was passed under the threat of asking King George VI to create sufficient liberal peers to ensure its passage through the House of Lords. B. CRICK, *THE REFORM OF PARLIAMENT* 106 (1965).

In 1937, the Court upheld by a five to four vote a minimum wage law in the State of Washington.¹²⁹ With the appointment of William O. Douglas and Congressman Hugo Black, the Supreme Court's change in focus became firmly entrenched. The Court would give only minimal review to federal and state laws touching upon mere economic concerns, such as employment,¹³⁰ product safety¹³¹ or business regulation.¹³² These laws were presumed constitutional. The Court assumed a valid legislative purpose, and a person challenging the law had an embellished burden to show that the law had absolutely no rational basis. The Court began a policy of non-intervention where legislation affected mere economic property or business liberty,¹³³ and repeatedly refused to weigh the wisdom of legislation in economic matters.¹³⁴ While state and federal statutes regulating economic matters became subject to minimal review,¹³⁵ different "preferred" rights such as speech and privacy became subject to more careful scrutiny.¹³⁶

VII. EQUAL PROTECTION OF THE LAWS: DUE PROCESS BY ANOTHER NAME

The "equal protection" analysis of the Court is, I submit, a "wolf in sheep's clothing," for that rationale is no more than a masquerade of a supposedly objective standard for *subjective* judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this Court has in recent times effectively substituted its own "enlightened" social philosophy for that of the legislature no less than it did in the older days the judicial adherents of the now discredited doctrine of "substantive" due process.

Justice John Harlan¹³⁷

The fourteenth amendment was adopted after the Civil War to guarantee equality among the races in state law (equal protection) and procedure (due process).¹³⁸ Because the Constitution did not prohibit racial inequality before

129. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

130. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

131. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

132. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

133. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955). But see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

134. In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court refused to sit as a "superlegislature to weigh the wisdom of legislation," and emphatically refused to "go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" *Id.* at 731-32.

135. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 44.

136. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

137. *Williams v. Illinois*, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) (emphasis in original).

138. The pre-Civil War due process clause of the Fifth Amendment was discussed in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856).

the Civil War, states freely practiced oppression of minorities through their laws. It is important to note that the equal protection clause referred expressly to state law and not federal law.¹³⁹ Where state law promised nothing, equal protection did not apply.¹⁴⁰

Originally, equal protection was not concerned with inequality with respect to business, sex or taxes. Nor did equal protection encompass the right to vote in state elections, which on a racial basis was protected by the fifteenth amendment.¹⁴¹ The same Court that changed the definition of due process also altered the original meaning of equal protection. In *Chicago, Milwaukee and St. Paul Railway v. Minnesota*,¹⁴² the Court held that unreasonable freight rates deprived the railroad of equal protection of the laws. The Court stated that "insofar as it is thus deprived while others are permitted to receive reasonable profits from their invested capital the company is deprived of the equal protection of the laws."¹⁴³ Equal protection after 1890 would no longer refer exclusively to a promise of racial equality in the application of state laws.

Today equal protection of the law generally bars irrational, arbitrary, irrelevant, unreasonable or invidious state classifications.¹⁴⁴ There are at least two kinds of equal protection: economic equal protection and modern equal protection. There is one test for legislation that impacts on fundamental rights or "suspect" classifications, such as race or alienage. State laws on these subjects must be for compelling state goals. There is a second test for legislation touching non-suspect classifications. This legislation need only be rationally related to a legitimate state interest.¹⁴⁵

In *Strauder v. Virginia*,¹⁴⁶ the Court struck down on an equal protection basis a statute forbidding blacks from serving on juries. This 1880 decision represents one of the last equal protection cases to apply the clause's original intent.

Justice Douglas, in an appendix to his 1970 opinion in *Oregon v. Mitchell*,¹⁴⁷ set out those cases where the Supreme Court struck down under the equal protection clause state statutes that discriminated on a basis other than

139. U.S. CONST. amend. XIV. Section five of the fourteenth amendment provides, "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

140. *Missouri v. Lewis*, 101 U.S. 22, 29-30 (1879).

141. U.S. CONST. amend. XV. The fifteenth amendment forbids states to deny or abridge the right to vote "on account of race, color or previous condition of servitude."

142. 134 U.S. 418 (1890).

143. *Id.* at 452.

144. See, e.g., Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier and the Role of the Court*, 14 U.S.F.L. REV. 525, 550 (1980) (excellent chart prepared by Fox that summarizes equal protection analysis).

145. *Id.* The various views of the current Court toward equal protection review can be found in a zoning case involving mental retardation. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

146. 100 U.S. 303, 310 (1880).

147. 400 U.S. 112, 150-52 (1970).

race. In this appendix, the first case he cites is *Gulf, Colorado and Santa Fe Railway v. Ellis*,¹⁴⁸ an 1896 decision where the Court held that a Texas statute requiring railway companies to pay attorneys' fees to parties successfully suing them denied the railroads equal protection of the law. This decision is nothing more than a post-coup d'état due process decision requiring non-racial classifications to be reasonable.¹⁴⁹ This is not the inquiry that the framers of the fourteenth amendment intended when they required equality in state substantive law. Instead, it is a version of due process which forbids unreasonable legislation.

Today, any state law that classifies things or people differently by failing to include enough people (under-inclusive laws) or by including too many (over-inclusive laws) is subject to a colorable contention that it discriminates in violation of the equal protection clause.¹⁵⁰ A law may discriminate on its face or treat people differently as applied. Equal protection today is not just race related.¹⁵¹

At first, the 1890's version of equal protection was surrounded by a presumption that any legislation was reasonable. This was accompanied by a heavy burden to prove that no set of facts could justify the measure. In a 1927 challenge to a state statute that required sterilization of the mentally ill, the Court dismissed the equal protection argument as being the last resort of constitutional argument.¹⁵² Fifteen years later, in *Skinner v. Oklahoma*,¹⁵³ the Court invalidated another sterilization law as an equal protection violation.¹⁵⁴ In 1890, equal protection prohibited states from enacting legislation

148. 165 U.S. 150, 153 (1896).

149. The *Ellis* decision highlights the transition from race (the original equal protection) to a liberated 1896 capital era version:

But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that, if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.

Id. at 153 (citations omitted).

150. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-53 (1949).

151. For a list of classes which have been held discriminated against and the rights affected, see Antieau, *The Jurisprudence of Interests and Adjudication of Equal Protection Controversies*, 57 U. DET. J. URB. L. 831, 835-36, 838-39 (1980).

152. *Buck v. Bell*, 274 U.S. 200, 208 (1927).

153. 316 U.S. 537 (1942).

154. *Id.* at 541.

without some reasonable basis. Those who challenged a classification carried the burden of proof. After 1940, certain suspect criteria affecting fundamental rights triggered strict scrutiny, and legislation would be held to deny equal protection unless the state could demonstrate a compelling interest.¹⁵⁵

Today, equal protection review is based on the the character of the classification, the individual in the allegedly discriminated class, and the state's interest in support of whatever classification appears in the statute. The almost insurmountable obstacles found in activist due process analysis still remain. In a case challenging a statute requiring state police to retire at fifty, Justice Marshall bitterly complained that:

[Although] the Court outwardly adheres to the two-tier model, it has apparently lost interest in recognizing further "fundamental" rights and "suspect" classes. In my view, this result is the natural consequence of the limitations of the Court's traditional equal protection analyses. If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always is struck down.¹⁵⁶

By describing a state law's ends as important, cogent, paramount or fundamental, or its means as invidious, rational, least drastic or subordinating, the Supreme Court engrafts their own undemocratic judicial values under the guise of describing a state's burden of proof. There is no legitimacy to this process.¹⁵⁷

The Supreme Court's unequal treatment of congressional efforts to implement fourteenth amendment equality bears contrast. Section five of the fourteenth amendment explicitly gives Congress the power to enforce the amendment. In *Baker v. Carr*,¹⁵⁸ the Court cast aside its reluctance to decide political questions in order to invalidate, as a violation of equal protection, archaic state voting laws. Eight years later, in *Oregon v. Mitchell*,¹⁵⁹ Congress attempted to give the right to vote in federal and state elections to eighteen-year-olds. Four justices thought the whole scheme was unconstitutional since the fifteenth, not the fourteenth, amendment concerned the vote. Two justices thought it was unequivocally constitutional, and the remaining justices, by a mere plurality, upheld the measure as applied to federal elections only.¹⁶⁰

155. See Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 n.25 (1969); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula"*, 16 UCLA L. REV. 716, 719-20 (1969).

156. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 317-18 (1965) (Marshall, J., dissenting).

157. *Cf. Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) (discussing application of equal protection by earlier Supreme Courts).

158. 369 U.S. 186 (1962).

159. 400 U.S. 112 (1970).

160. Several months after the *Mitchell* decision, the twenty-sixth amendment was ratified. The amendment provides that the federal and state government may not deny the vote "on account of age" to citizens "eighteen years of age or older." U.S. CONST. amend. XXVI.

The drafters of the United States Constitution intended that the document be construed as originally written unless amended in accordance with the process provided for in article IV. Original equal protection required not rationality, but consistency. The unvarnished truth is that "strict," "rational" and "in-between" versions of equal protection are nothing more than the 1890 rule of reason misconstructions of the phrase "due process of law."¹⁶¹

VIII. FIRST AMENDMENT DUE PROCESS

Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Constitution of the State of New York¹⁶²

The first amendment forbids Congress from abridging freedom of speech or the press. The framer's intent was to forbid prior restraint and censorship.¹⁶³ In the 1925 decision of *Gitlow v. New York*,¹⁶⁴ a draft protester was convicted of criminal anarchy by speech and advocacy. In affirming Gitlow's conviction, speech liberty was casually incorporated into the fourteenth amendment due process clause. Justice Sanford wrote:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.¹⁶⁵

All state constitutions have their own free speech guarantees.¹⁶⁶ *Gitlow*, however, gave the Supreme Court massive new jurisdiction to determine on a uniform basis what is speech and when it can be regulated, infringed or punished by the states. Because the 1890 court had already found that all laws regulating liberty were required to be reasonable, a path had been hewed to review state restrictions on liberty of speech or the press.

A few years before *Gitlow*, Justice Holmes set forth a first amendment test to determine when speech could be punished. In *Schenk v. United*

161. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Harlan wrote in his dissent: "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." *Id.* at 554. This is so because the *Plessy* majority opinion is in fact a *Dred Scott* due process inquiry not whether separate was equal, but whether the whole scheme was reasonable.

162. N.Y. CONST. art. 1, § 8.

163. See generally Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1942).

164. 268 U.S. 652 (1925).

165. *Id.* at 666.

166. For a survey of state constitutions, see *State Constitutional Law*, NAT'L. L.J., Sept. 29, 1986, at S6.

States,¹⁶⁷ the defendants were convicted of seeking to disrupt the military's effort to recruit personnel. Justice Holmes formulated the "clear and present danger" test as follows:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.¹⁶⁸

The clear and present danger test stressed neither the language nor the words themselves, but rather the time and the context in which they were used. A debate between Justices Frankfurter and Black ensued in the 1940's as to the true meaning of clear and present danger. Was it a universal test for speech or just a tidy formula now being applied in multitudinous state cases?

In a "loudspeaker" case,¹⁶⁹ Justice Frankfurter complained:

My brother Reed speaks of "the preferred position of freedom of speech." This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity.

The objection to summarizing this line of thought by the phrase "the preferred position of freedom of speech" is that it expresses a complicated process of constitutional adjudication by a deceptive formula. And it was Mr. Justice Holmes who admonished us that "To rest upon a formula is a slumber that, prolonged, means death." Such a formula makes for mechanical jurisprudence.¹⁷⁰

Justice Frankfurter rejected any notion that speech was any more preferred a liberty than any other provision of the Bill of Rights. Instead, he espoused a balancing approach where the Court would weigh free speech with interests such as security, privacy or other state and federal governmental concerns. The 1940's Court applied a clear and present danger test to information broadcast from sound trucks,¹⁷¹ free press versus fair trial,¹⁷² and disorderly

167. 249 U.S. 47 (1919).

168. *Id.* at 52.

169. *Kovaks v. Cooper*, 336 U.S. 77 (1949).

170. *Id.* at 90, 96 (Frankfurter, J., concurring) (citation omitted). The idea of preferred rights or freedoms, and presumptive invalidity arising therefrom, was proffered by Justice Stone in *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938): "There may be narrower scope for the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 152 n.4.

171. *Kovaks v. Cooper*, 336 U.S. 77 (1949).

172. *Craig v. Harney*, 331 U.S. 367 (1947).

speech.¹⁷³ The clear and present danger test today lies in constitutional limbo, seldom cited, often disparaged, but never overruled.¹⁷⁴

Instead, the Court remains divided over the issue of free speech. Some Justices follow the doctrine espoused by Justice Black and contend that the first amendment is an absolute prohibition on any or all laws regulating speech. Justice Black stated his position this way: "My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write."¹⁷⁵ This absolutist approach to the first amendment¹⁷⁶ has been rejected by a majority of the Courts that prefer to balance freedom of speech with other competing state and federal government concerns.¹⁷⁷

After the first amendment became applicable to states through the due process clause of the fourteenth amendment, the police and reserved powers left to states became new weights on a first amendment scale. The United States Supreme Court was not accustomed to petty city and state problems associated with typical issues such as noise versus speaker, property versus access to speak or developer versus conservationist. These clashes require a person-to-person analysis and weighing of competing concerns, which the Supreme Court cannot perform well.

Local law, government and constitutions were designed to balance and resolve citizen disputes in petty affairs. At the Supreme Court level, states are today mere appellants or respondents. They no longer arbitrate but instead appear in constitutional litigation as a disputant. The Court ultimately does their balancing for them.

Nobody in 1787, 1791 or 1868 dreamed that states would be routinely sued by their own citizens before the United States Supreme Court. Moreover,

173. *Herndon v. Lowry*, 301 U.S. 242 (1937).

174. The clear and present danger test has many problems. Suppose the danger was clear but not present (Communism), or present but not emphatically clearly evil (obscenity)? Is this a question of law or a question of fact? And suppose Congress or a state finds that certain speech is a clear and present danger? In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court put clear and present danger into a footnote. Justice Black wrote in his concurring opinion:

I agree with the views expressed by Mr. Justice Douglas in his concurring opinion in this case that the "clear and present danger" doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis v. United States*, 341 U.S. 494 (1951) but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

Id. at 449-50 (Black, J., concurring).

175. Cohn & Black, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 559 (1962).

176. "The great danger of the judiciary balancing process is that in times of emergency and stress, it gives Government the power to do what it thinks necessary to protect itself, regardless of the rights of individuals." Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 878 (1960).

177. See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1443 (1962).

the effect of balancing free speech rights with concerns that were not part of the original first amendment requires a watered down version of the first amendment in state cases. The effect of balancing speech in the local context in a manner unresponsive to differing federal or national concerns is to create two versions of one amendment. Some of us have often wondered why federal obscenity law should be determined by local standards,¹⁷⁸ or how an interstate federal disorderly conduct statute came to be.¹⁷⁹ The Court has enough problems in areas such as congressional regulation of speech, national security, political, commercial, corporate expression and the Federal Communications Commission. Nevertheless, it continues to be mired in state issues.

Too much litigation breeds a constitutional law of blurred, indistinct and hopelessly divided pluralities. The establishment clause is a case in point. The framers intended the establishment clause to prohibit the designation of a national church.¹⁸⁰ One hundred and fifty years later in *Cantwell v. Connecticut*,¹⁸¹ the Court made the establishment clause applicable to the states through the fourteenth amendment. One of Jefferson's many metaphors had become yet another liberty "implicit" in an ordered liberty of due process:

We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.¹⁸²

The effect of incorporating the establishment clause without a shred of historicity has led to the very clash the framers were seeking to avoid. This is the clash between accommodation and separation. Today every benefit to religion legislated by a state tends to establish religion, but when the benefit is denied, a violation of free exercise is alleged.

178. See *Miller v. California*, 413 U.S. 15 (1973). Does the first amendment protect a high school student from punishment for delivering a speech containing sexual innuendo? In *Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159 (1986), the respondent alleged a violation of his first amendment rights to freedom of speech and sought injunctive relief and monetary damages under 42 U.S.C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the first amendment, that the school's disruptive-conduct rule was unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speakers list violated the due process clause of the fourteenth amendment. The United States Supreme Court reversed the award. *Id.* at 3167.

179. 1968 Federal Anti-Riot Act, 18 U.S.C. § 2101 (1968).

180. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2516 (1985) (Rehnquist, J., dissenting).

181. 310 U.S. 296 (1940).

182. *Id.* at 303.

The Supreme Court forbids excessive entanglement of a state with religion.¹⁸³ However, the Court itself is entangled in finding religious purpose or effect in state measures.¹⁸⁴ Recently, after an invocation for divine providence, the Court declared unconstitutional an Alabama statute that provided for a moment of silence.¹⁸⁵ The statute specifically stated that voluntary prayer was one of the authorized activities during that moment of silence.¹⁸⁶ The Court found that the one minute period "for meditation or voluntary prayer" was motivated by a desire to advance religion.¹⁸⁷ The religion area is a catch-22 because the measures must be supervised to ensure that the laws remain nonsectarian, but in doing so one must embrace forbidden entanglement.¹⁸⁸

Many years ago, Justice Jackson wrote:

It is idle to pretend . . . that the task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins Nor can we find any guidance in any other legal source. It is a matter on which we can find no law but our own pre-possession.¹⁸⁹

More recently, Justice Rehnquist, totally disillusioned by the prevailing entanglement test in state cases, wrote bitterly:

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," has produced only consistent unpredictability, and today's effort is just a continuation of "the Sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier'" described in *Lemon v. Kurtzman*.¹⁹⁰

Today there are many shrill voices proposing amendments authorizing prayer in school.¹⁹¹ There are several causes of this development, not the

183. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

184. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (creches); *Marsh v. Chambers*, 463 U.S. 783 (1983) (chaplains); *Meek v. Pittenger*, 421 U.S. 349 (1975) (textbooks); *Tilton v. Richardson*, 403 U.S. 672 (1971) (church-related college construction); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (teacher salaries); *Walz v. Tax Comm'r*, 397 U.S. 664 (1970) (tax exemptions); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (evolution); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading).

185. *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985).

186. *Id.* at 2481.

187. *Id.* at 2493.

188. In his dissent in *Wallace*, Justice Rehnquist sets out some of the cracks in the due process religion wall. *Id.* at 2518-19 (Rehnquist, J., dissenting) (citations omitted).

189. 333 U.S. 203, 237 (1948).

190. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2519-20 (1985) (Rehnquist, J., dissenting) (citations omitted).

191. A proposed constitutional amendment, designed to permit prayer in public schools, failed to get the requisite two-thirds majority in the United States Senate. The proposed

least of which is the 1890 misconception by which due process of law could become anything or maybe everything.

IX. DUE PROCESS AND THE FOURTH AMENDMENT

Is it, or is it not, a good thing that the legislation enacted by each state to meet local conditions and to regulate local relations should be standardized by being forced to comply to a new definition of "liberty" applied to every State by the judicial branch of the National Government.

Charles Warren¹⁹²

The fourth amendment protects people and their papers and effects from unreasonable searches by federal officials. Each state in its own Bill of Rights also has a search and seizure clause.¹⁹³ In 1914, the Supreme Court decided that items seized illegally would be inadmissible in federal prosecutions.¹⁹⁴ Exclusion of illegally gathered evidence was a judge-made remedial rule designed as a deterrent to police misconduct. Another rationale for excluding illegally seized evidence is the belief that courts should not condone illegality by using tainted evidence.¹⁹⁵

In 1949, the Supreme Court, using the due process clause of the fourteenth amendment, casually made another liberty applicable to the states. In *Wolf v. Colorado*,¹⁹⁶ the Supreme Court affirmed a state conviction but grabbed immense new jurisdiction by making the fourth amendment applicable to every criminal court in America. The Court wrote, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause."¹⁹⁷

Justice Frankfurter, author of the *Wolf* decision, was a somewhat conservative, federalist judge. He believed that only the fourth amendment, not

amendment stated:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer. Neither the United States nor any state shall compose the words of any prayer to be said in public schools.

S.J. Res. 218, 98th Cong., 2d Sess. (1984).

192. See Warren, *supra* note 102, 464-65.

193. *Wolf v. Colorado*, 338 U.S. 25 (1949); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). Article IV of the Constitution requires all states to have a republican form of government, and this includes a Bill of Rights.

194. *Weeks v. United States*, 232 U.S. 383 (1914).

195. See *Olmstead v. United States*, 277 U.S. 438, 435 (1928) (Brandeis, J., dissenting).

196. 338 U.S. 25 (1949).

197. *Id.* at 30.

the exclusionary rule, should be binding on the states. Justice Frankfurter noted:

Granting that in practice the exclusionary rule may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.¹⁹⁸

Justice Black concurred in *Wolf's* rejection of the exclusionary rule, as he was not one to add new words to the exact language of the Bill of Rights: "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the fourth amendment but is a judicially-created rule of evidence which Congress might negate."¹⁹⁹

The notion in *Wolf* that the exclusionary rule did not apply to the states created constitutional problems for the Court. After all, there is only one fourth amendment. A watered down bi-level version of the fourth amendment would be arbitrary, but a consistent federal-state approach might be unresponsive to local concerns and conditions. It must have been difficult during the period from 1949 to 1961 for the Supreme Court to apply one version of the fourth amendment to a federal case in the morning and a different version to a state case in the afternoon. During this time state convictions based on illegally seized evidence were reversed only if the offending conduct was deemed "shocking to the conscience of the Court."²⁰⁰ Justice Black, who sat in Congress during the early era of economic liberty and due process, was disturbed by the Court's use of its collective conscience to determine whether the fourth amendment was violated. In 1961 Justice Black complained:

The majority emphasize that these states do not refer to their own consciences or to their sense of justice and decency. For we are told that we may not draw on our merely personal and private notions

If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution?²⁰¹

198. *Id.* at 31.

199. *Id.* at 39-40. Black reached exclusionary results by claiming that the self-incrimination clause of the fifth amendment excluded objects or real evidence. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

200. *Rochin v. California*, 342 U.S. 165 (1952). Compare *Rochin v. California with Brechaupt v. Alsann*, 352 U.S. 432 (1957). The "shock the conscience" test for fourth amendment procedures is very much alive. See *Winston v. Lee*, 105 S. Ct. 1611 (1985) (court-ordered surgery to remove a bullet from defendant was found unreasonable).

201. *Rochin v. California*, 342 U.S. 165, 175-76 (1952) (Black, J., concurring).

Justice Frankfurter was also disturbed with the Court's interpretation of the fourth amendment in state cases. In *Elkins v. United States*,²⁰² Justice Frankfurter observed that:

The divisions in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amendment and the shifting views of members in the Court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn.²⁰³

In 1957, police officers with a phony search warrant seized obscene material from Dolly Mapp.²⁰⁴ Mapp was convicted of a knowing possession of obscenity.²⁰⁵ Dolly appealed her conviction on grounds other than the exclusionary rule.²⁰⁶ The Supreme Court, however, saw this case as an opportunity to overrule *Wolf*. Under the flexible contours of the due process clause, *Mapp v. Ohio* made the exclusionary rule applicable to the states.²⁰⁷

In one fell swoop, the Supreme Court obtained new jurisdiction to reverse convictions in every criminal trial court in the country. The plurality wrote:

Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.²⁰⁸

All the federal problems were now a shared experience with the fifty states.²⁰⁹ Only due process could attempt to promulgate a universal federal-state standard of reasonableness.²¹⁰ Incorporation is but a beginning.

Once the United States Supreme Court makes amendments applicable to the states by due process, it creates new areas of jurisdiction found only in the penumbras of the newly incorporated amendments. The Court possesses a mandate to find in the incorporated liberties newer life and substance. In state cases under the fourteenth amendment there is no framer's intent,

202. 364 U.S. 217 (1960).

203. *Id.* at 238.

204. *Mapp v. Ohio*, 367 U.S. 643, 644-45 (1961).

205. *Id.* at 643.

206. *Id.* at 646 n.4.

207. *Id.* at 660.

208. *Id.*

209. See Waite, *Whose Rules? The Problem of Improper Police Methods*, 48 A.B.A. J. 1057, 1058 (1962).

210. See Cameron & Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109 (1984).

original history or clumsy precedent to hinder the Court's ongoing quest. In *Griswold v. Connecticut*,²¹¹ the Supreme Court found a penumbra due process right of "privacy" in the fourth amendment.²¹² In 1973 the liberty to abort in the first trimester became an emanation of privacy rights. In *Roe v. Wade*,²¹³ the Supreme Court majority wrote:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.²¹⁴

The "blessing of liberty" in *Roe* was, as the dissent notes, "an exercise of raw judicial power."²¹⁵ The 1890 misconstruction made all this possible.

X. MISCELLANEOUS PROCEDURAL DUE PROCESS IN CIVIL AND CRIMINAL CASES

Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court "that to cut off a welfare recipient in the

211. 381 U.S. 479 (1965).

212. Justice Black wrote in his dissent in *Griswold*:

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against unreasonable searches and seizures. "Privacy" is a broad, abstract and ambiguous concept which can be easily be shrunk in meaning but which can [also] easily be interpreted as a constitutional ban against many things other than searches and seizures.

Id. at 509 (Black, J., dissenting). This revealing quote explains Justice Black's 1947 dissent in *Adamson v. California*, where he first espoused the view that the fourteenth amendment due process clause incorporated the federal Bill of Rights and absolutely nothing more. 322 U.S. 46, 71-72 (1947) (Black, J., dissenting). Justice Black was not alone in finding solace from due process in the specificity of federal amendments. In 1943, Justice Jackson wrote:

The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the first amendment become its standard.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). By 1952 he had changed his mind:

The history of criminal libel in America convinces me that the Fourteenth Amendment did not incorporate the First, that the powers of Congress and of the States over this subject are not of the same dimensions and that because Congress probably could not enact this law it does not follow that the states may not.

Beauharnais v. Illinois, 343 U.S. 250, 288 (1952) (Jackson, J., dissenting).

213. 410 U.S. 113 (1973).

214. *Id.* at 153.

215. *Id.* at 171 (Rehnquist, J., dissenting).

face of . . . 'brutal need' without a prior hearing of some sort is unconscionable," and therefore, says the Court, unconstitutional.

This decision is thus only another variant of the view often expressed by some members of the Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences." Neither these words nor any like them appear anywhere in the Due Process Clause . . .

Justice Hugo Black²¹⁶

Seven years after the passage of the fourteenth amendment, a black citizen brought a civil rights action against the owner of a coffee house for refusing him refreshment because of his race.²¹⁷ Louisiana law provided for the judge to make the decision in the case.²¹⁸ A judgment for \$1000 was entered for the plaintiff and the cafe owner appealed, insisting that the new due process clause of the new fourteenth amendment gave him a constitutional right to have a jury decide the case.²¹⁹ Chief Justice White, whose opinion was well within the mainstream of contemporary constitutional philosophy, wrote: "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way."²²⁰

Ninety years later, a 7-2 majority of the Supreme Court declared that Louisiana and every other state in the Union must award jury trials in all criminal cases in which a federal court would award a jury trial.²²¹ Nearly two hundred years of separate state and federal trial procedures became unconstitutional as a result of an appeal from the same state construing the same clause of the same Constitution.

By what power may the Supreme Court decree uniform trial rights for every state criminal court in the nation? Why is it that the strictures of a written constitution are subject to such broad interpretation? The answer lies in the phrase "due process of law." The transformation of the due process clause from a modest requirement that state procedures be applied equally to a grant of legislative power to the Supreme Court came in the constitutional coup d'etat of 1890.

216. *Goldberg v. Kelly*, 397 U.S. 254, 275-76 (1970) (Black, J., dissenting) (citation omitted).

217. *Walker v. Sauvinet*, 92 U.S. 90 (1875).

218. *Id.* at 91.

219. *Id.* at 92.

220. *Id.* On the original understandings of how the fourteenth amendment should affect jury trials in state cases, the Supreme Court in *Missouri v. Lewis*, 101 U.S. 22 (1879), could not have been much more emphatic:

If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so.

Id. at 31.

221. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Procedural due process requires notice, hearing and fundamental fairness whenever government action deprives one of life, liberty or property. Miscellaneous procedural due process requires a two-step analysis. First, the Court must determine whether the life, liberty or property interest is of sufficient worth to warrant any prior notice or procedure before a taking. Second, the Supreme Court must decide whether the liberty or property interest requires procedures to protect it and then of what those procedures must consist.

The greater the state's or the Court's estimate of the particular right, liberty or property involved, the greater the miscellaneous process due before this right can be abridged.²²² The Court must determine whether mere notice is enough to satisfy due process requirements or whether trial-type procedures are required.²²³ In 1971, the Supreme Court required notice before the State of Wisconsin could prohibit an adult of drinking age from buying alcohol.²²⁴ Five years later, however, the Court found that a person's liberty or property interest in his reputation alone²²⁵ was not enough to force a required prior hearing before circulating a flyer with petitioner's name listed as an active shoplifter.²²⁶

In *Ingraham v. Wright*, corporal punishment in high school was held to trigger fourteenth amendment liberty interests.²²⁷ The rest of the opinion, however, was lost in a discussion of what prior notice or process was due students other than *post hoc* resort to state common law damage remedies.²²⁸ It seems to make little difference whether a liberty or property interest is federal or state in origin, for in all events procedural due process will demand whatever the Supreme Court says it requires.

222. In *Regents of the Univ. of Mich. v. Ewing*, 106 S. Ct. 507 (1986), the Court, assuming that a student had a property interest, held that a state university's decision to dismiss a student after the student failed a medical board examination did not so substantially depart from accepted academic norms to demonstrate that the university failed to exercise professional judgment. *Id.* at 514.

223. A procedural due process analysis has been applied in many diverse areas. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980) (nursing home closings); *Parham v. J.R.*, 442 U.S. 584 (1979) (medical commitment); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (post-arrest review); *Goss v. Topez*, 419 U.S. 565 (1975) (adoptions); *Perry v. Sinderman*, 408 U.S. 593 (1972) (review of tenured state employment); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (public employment dismissals); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *Bell v. Burson*, 402 U.S. 593 (1972) (revocation of drivers license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefit termination); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wage garnishment); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency dispositions).

224. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

225. *Paul v. Davis*, 424 U.S. 693 (1976).

226. *Id.* at 712.

227. 430 U.S. 651 (1977).

228. See Rosenberg, *Ingraham v. Wright*, *The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978).

In criminal cases, miscellaneous due process requires a fair judge and jury and proof beyond a reasonable doubt.²²⁹ State and federal law creating presumptions in criminal cases must be both rational and fair.²³⁰ Miscellaneous due process also covers state criminal statutes challenged on grounds of excessive vagueness²³¹ or over-breadth.²³² Where incorporated freedoms are involved, state statutes are more likely to suffer close procedural due process scrutiny.²³³ The difference between original procedural due process and post-1890 due process is that before 1890 there was constitutional due process whenever there was notice or a trial under the applicable law of the jurisdiction.²³⁴ Today, state and federal law has absolutely no special dispositive significance as to whether a deprivation of life, liberty, or property requires more procedure than the particular law or statute provides.

There was nothing controversial about the Supreme Court requiring lawmakers, Congress, and the states to follow the procedures that they had legislated. But after 1890, that is not what happened. Instead, the Court, without reference to any authority but itself as custodian of the due process clause, decided what procedures states and the federal government must follow. Hidden in the Court's required procedures is the majority's view of values or what is important in life.²³⁵ Original due process was supposed to be bold, dynamic and capable of change, too, but by creative state legislative action.²³⁶ Today, instead of the dynamics of fifty different state legislatures

229. See, e.g., *Taylor v. Louisiana*, 419 U.S. 352 (1975) (fair jury required); *In re Winship*, 397 U.S. 358 (1970) (proof beyond reasonable doubt required); *Tumey v. Ohio*, 273 U.S. 510 (1927) (fair judge required).

230. See Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980); Nesson, *Rationality, Presumptions and Judicial Comment, A Reponse to Professor Allen, More on Constitutional Process of Proof Problems in Criminal Cases*, 94 HARV. L. REV. 1574 (1981).

231. See, e.g., *Colton v. Kentucky*, 407 U.S. 104 (1972).

232. See, e.g., *Plumber v. Columbus*, 414 U.S. 2 (1973).

233. See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

234. See *Davidson v. New Orleans*, 96 U.S. 97 (1887) (appellants unsuccessfully sought to have fifth amendment guarantee of just compensation for taking of private property incorporated into fourteenth amendment due process).

235. See Diver, *The Wrath of Roth*, 94 YALE L.J. 1529, 1543 (1985).

236. In *Hurtado v. California*, 110 U.S. 516 (1884), the Court stated:

Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State.

Id. at 535. *Hurtado* held that if a proceeding followed usages of England and this country, due process was satisfied. *Id.* at 528. However, as a caveat, the court added:

[I]t by no means follows that nothing else can be due process of law [T]o hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age and to render it incapable of improvement. It

enacting progressive procedures, we have a universal due process requirement, frozen in place by a due process, which, since 1890, may change if the justices on the Court change.

XI. FIFTH AND SIXTH AMENDMENT RIGHTS BECOME APPLICABLE TO THE STATES THROUGH DUE PROCESS

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.

Justice Oliver Wendell Holmes²³⁷

England, before the American Revolution, had experienced witchcraft, union of church and state, mad kings, a despot named Oliver Cromwell, fifteen branches of law, nine court systems, and 149 capital offenses.²³⁸ Trials for heresy and treason were most often conducted with a combination of investigatory and adversary procedures.²³⁹ The framers of the Constitution had this historical background in mind when they devised the American system of justice.

The Constitution forbids bills of attainder and *ex post facto* laws.²⁴⁰ Article III, section 3, following the definition of treason, provides that "no attainder or treason shall work corruption of Blood or Forfeiture except during the life of the person attained."²⁴¹ While these measures seemed adequate, those who drafted the Bill of Rights took no chances.

Following the adoption of the Bill of Rights, the former colonies conducted criminal trials by adversary rules before juries. The adversary system contemplated that truth could best be discovered in the clash of parties, opposing and reacting to each other within the bounds of fairness and relevancy. The adversary system was a vast improvement for a colonial society accustomed to magic and trial by wager.²⁴²

would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

Id. at 528-29.

237. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

238. See 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 178-87 (1923); Thayer, *Older Modes of Trial*, 5 HARV. L. REV. 45 (1891); Moschzisker, *The Historic Origins of Trial by Jury*, 70 U. PA. L. REV. 1 (1921).

239. See Currie, *Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe*, 3 LAW & SOC'Y REV. 7 (1968).

240. U.S. CONST. art I, § 8.

241. U.S. CONST. art III, § 3.

242. See H. MAINE, *ANCIENT LAW* (1917).

The system of fact-finding called inquests was popular in European society. Inquisition procedures combine fact-finding with investigation.²⁴³ The traditional distinction between the adversarial and the inquisitorial system is the role of the fact-finder. In the adversary system the fact-finder is passive, while in the inquisitorial system the fact-finder takes an active role.²⁴⁴

The fifth and sixth amendments are based on the adversary model. Together they provide a constitutional code of criminal procedure. Prior to the 1960's, only federal courts were bound by the fifth and sixth amendments. From 1890 to the 1960's, the Supreme Court only occasionally used procedural due process to require the states to follow certain practices and guarantee certain rights. In 1936, the use of coerced confessions in state cases was held to violate fundamental fairness.²⁴⁵ In 1932, the right to counsel was held applicable to the states in capital cases.²⁴⁶ The right to counsel was extended to serious felonies in 1942.²⁴⁷ Using due process, the Warren Court made specific federal rights and language applicable to the states as restrictions on their freedom of action to abridge or create new procedures in local criminal cases.²⁴⁸

In 1964, the fifth amendment self-incrimination clause was incorporated into due process in *Malloy v. Hogan*.²⁴⁹ Less than twenty years earlier, Justice Frankfurter had written in *Adamson v. California*:

The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this court again and again, after impressive consideration Only the other day the Court reaffirmed this rejection after thorough re-examination of the scope and

243. A presidential commission, a grand jury, Congressional investigations and a coroner's hearing are characterized by their inquest procedure.

244. See generally J. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (1936). For a chart that displays the difference between an adversarial procedure and an inquest, see Burns, *State Criminal Trials Adversary or Inquest: Did Due Process Reform the Wrong System*, 2 *LOY. U. CHI. L.J.* 249, 252-53 (1971).

245. *Brown v. Mississippi*, 297 U.S. 278 (1936).

246. *Powell v. Alabama*, 287 U.S. 45 (1932).

247. *Betts v. Brady*, 316 U.S. 435 (1942).

248. In 1963, the sixth amendment right to counsel was required in all serious state crimes. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The confrontation clause, *Pointer v. Texas*, 380 U.S. 400 (1965), the right against self-incrimination, *Malloy v. Hogan*, 378 U.S. 1 (1964), the right to a speedy trial, *Klopfer v. North Carolina*, 386 U.S. 213 (1968), compulsory process, *Washington v. Texas*, 338 U.S. 14 (1967), and the prohibition against double jeopardy, *Benton v. Louisiana*, 391 U.S. 145 (1969), were also soon incorporated. In 1968, the right to a trial by jury became applicable to the states. Ninety years earlier the Supreme Court in review of the same clause had written that "the states so far as this amendment is concerned are left to regulate trials in their own courts in their own way." *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Supreme Court held that Louisiana and every other state in the Union must award jury trials in all criminal cases in which federal courts would award a jury.

249. 378 U.S. 1 (1964).

function of the Due Process Clause of the Fourteenth Amendment
The issue is closed.²⁵⁰

That's what he thought. By 1970, every single case Justice Frankfurter cited was either explicitly or effectively overruled.²⁵¹ But the revolution had really been over since 1890.

The Warren Court adopted an elaborate array of constitutional procedures required in all state courts, only to discover in 1970 that most defendants in state criminal cases waive their constitutional rights and plead guilty.²⁵² A plea of guilty in open court is a voluntary surrender of the right to a trial by jury, the presumption of innocence, confrontation and freedom from self-incrimination.²⁵³ A plea of guilty waives most of the very rights incorporated by due process. The Supreme Court had reformed what it thought was an adversary system, only to find that the whole trial system in the states had been mostly replaced with a *de facto* inquisitional model administered by police, prosecutors, public defenders and state judges.²⁵⁴ How could a twelve-man jury system, developed from rural England, survive the population logistics of the Civil War, the Industrial Revolution or the immigration of millions? What do law enforcement personnel do in a large metropolitan area when confronted with many thousands of felony suspects? They practice negotiated justice.²⁵⁵ Mass crime demands an attrition process administered by police, prosecutors and the courts.

How are defendants persuaded to confess guilt to an offense in open court? There are ways. It is interesting to wonder, for instance, if the greatest civil rights could co-exist with the world's most numerous offenses and worst penalties? The rules to plea negotiation are not complicated. Start with the prosecutor's largely unreviewable discretion to charge, drop a charge, give immunity, and either recommend, not oppose, or agree to a sentence. Add the many possible degrees of felonies, misdemeanors, ordinance violations, multi-offenses, attempts, conspiracy and complex penitentiary release and probation possibilities, and the prosecutor has the clout to trade.²⁵⁶

250. *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J., concurring).

251. *Hurtado v. California*, 110 U.S. 516 (1884), was effectively overruled by *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Twining v. New Jersey*, 211 U.S. 78 (1908), was effectively overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964). *Brown v. Mississippi*, 297 U.S. 278 (1936), was effectively overruled by *Miranda v. Arizona*, 384 U.S. 436 (1965). *Palko v. Connecticut*, 302 U.S. 319 (1937), was expressly overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

252. See Finkelstein, *A Statistical Analysis to Guilty Plea Practice in the Federal Courts*, 89 HARV. L. REV. 293 (1976).

253. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform him of and determine that he understands his rights. FED. R. CRIM. P. 11(a).

254. See Burns, *supra* note 244, at 261.

255. Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927); Polstein, *How to "Settle" a Criminal Case*, 8 PRAC. LAW. 35 (1962); Note, *Guilty Plea Bargaining: Compromises by Prosecution to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

256. See Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV.

The incorporation of various procedural rights into the criminal justice process during the 1960's²⁵⁷ was followed by three cases in 1970 using miscellaneous procedural due process,²⁵⁸ which set guidelines to assist trial courts in waiving rights or surrendering the very procedures incorporated to the states by the same clause. Due process has been busy indeed.

XII. CAPITAL PUNISHMENT DUE PROCESS

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life.

Chief Justice Fuller²⁵⁹

The eighth amendment provides: "Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted."²⁶⁰ The framers of the eighth amendment did not regard the death penalty as "cruel

7 (1970). Waiver is a wonderful legal method to make a false promise and a wrong both right. As an equalizer, the doctrine describes two contraries—the *de jure* one that is always pretender to a more commonplace real world opposite.

257. The incorporated right to counsel includes competent counsel. The defendant is entitled to confront and cross-examine his accusers, but need not testify himself. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). It is unconstitutional to comment on his failure to testify. *Griffin v. California*, 380 U.S. 609 (1965). The defendant must not be convicted except by sufficient and untainted legal evidence or proof beyond a reasonable doubt, *Johnson v. Florida*, 391 U.S. 596 (1968), to the satisfaction of all (usually twelve) jurors. The defendant, except in petty cases, *Dyke v. Tyler Implement Co.*, 391 U.S. 216 (1968), has a constitutional right to a trial by jury. *Bloom v. Illinois*, 391 U.S. 194 (1968). No race can be consciously excluded from juries, *Donaldson v. California*, 404 U.S. 968 (1971), but the jury need not be blue ribbon. The defendant has the right to a speedy trial. *Klopfer v. North Carolina*, 386 U.S. 213 (1967). The defendant is entitled at all times to be represented by counsel, *Moore v. Michigan*, 355 U.S. 155 (1957), accorded one-way discovery, *Brady v. Maryland*, 373 U.S. 83 (1963), and counsel on appeal, *Anders v. California*, 386 U.S. 738 (1967). At all times the defendant must be shielded from prejudicial pretrial publicity, *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and must be convicted only on untainted evidence. Real evidence must have been obtained fairly, *Mapp v. Ohio*, 367 U.S. 643 (1961), pursuant to hundreds of rules of the Supreme Court in the search and seizure area. Confessions are inadmissible, if the result of an illegal search for real evidence, *Wong Sun v. United States*, 371 U.S. 471 (1963). Confessions are admissible when voluntary, if the suspect was informed of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). Voluntariness must not be left exclusively to the jury. *Jackson v. Denno*, 390 U.S. 570 (1967). Line-up testimony, if considered unfair, is inadmissible unless counsel for defendant was notified of the line-up. *United States v. Wade*, 388 U.S. 219 (1966). Every violation of a constitutional decision is deemed grounds for reversal unless the state proposes it to have been harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

258. *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

259. *In re Kemmler*, 136 U.S. 436 (1890).

260. U.S. CONST. amend. VIII.

and unusual." This conclusion is borne out by the Constitution's own reference in the fifth amendment that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" ²⁶¹ As originally written, the eighth amendment was not applicable to states at all. In the 1962 case of *Robinson v. California*, ²⁶² the Court, in striking down a California statute making drug addiction a crime, formally applied the eighth amendment to the states through the due process clause. Not until *Witherspoon v. Illinois* ²⁶³ did the Court become interested in the capital crime area. In *Witherspoon*, the defendant had killed a policeman. During *voir dire* the prosecutor excluded prospective jurors who expressed reservations about capital sentences. ²⁶⁴ The Supreme Court reversed *Witherspoon's* conviction on the ground that he was denied fundamental fairness. ²⁶⁵ The Court reasoned that not everybody who is opposed to capital punishment would necessarily let it affect their views in the particular case. ²⁶⁶

After the Court incorporated the eighth amendment, it began to examine state capital punishment cases. In 1972, Professor Amsterdam of Stanford Law School argued before the Supreme Court in *Furman v. Georgia*, ²⁶⁷ that capital punishment violated the eighth amendment as incorporated through due process because it left juries with unbridled discretion as to whom to execute, and therefore the system was arbitrary and capricious. Only a year before, in *McGautha v. California*, ²⁶⁸ the Supreme Court held that the due process clause did not impose limitations on a jury's discretion to impose the death penalty in capital cases. Instead, the *McGautha* Court assumed that judicially articulated standards for capital punishment were simply unnecessary. ²⁶⁹

Furman was a wonderful case to relitigate the question. Georgia juries had routinely imposed the death penalty on most blacks but seldom on any white felons. In *Furman*, all five Justices in the majority wrote separate opinions. ²⁷⁰ Two Justices concluded that the death penalty was per se "cruel and unusual" because the imposition of capital punishment "does not comport with human dignity" and because it is "morally unacceptable" and "excessive." ²⁷¹ One Justice concluded that because death is a penalty inflicted

261. U.S. CONST. amend. V.

262. 370 U.S. 660 (1962).

263. 391 U.S. 510 (1968).

264. *Id.* at 513. *Witherspoon* has been watered to the point of disappearance. See *Darden v. Wainwright*, 106 S. Ct. 2464 (1986); *Lockhart v. McCree*, 106 S. Ct. 1758 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985).

265. 391 U.S. at 522.

266. *Id.* at 519.

267. 408 U.S. 238 (1972).

268. 402 U.S. 183 (1971).

269. *Id.* at 221.

270. 408 U.S. 238 (1972).

271. *Id.* at 305 (Brennan, J., concurring); 359 (Marshall, J. concurring).

on the poor defendant but not the affluent defendant, it violated the implicit requirement of equality of treatment found within the eighth amendment.²⁷² The other two justices concluded that capital punishment was "cruel and unusual" because it was applied in an arbitrary, "wanton", and "freakish" manner.²⁷³ The four dissenters argued that the Constitution itself recognized capital punishment in the fifth and fourteenth amendments, and that capital punishment was not considered "cruel and unusual" when the amendments were adopted.²⁷⁴ The dissenters concluded that the majority had simply legislated its own private views of capital punishment.²⁷⁵

Some state supreme court justices follow the example of Justices Brennan and Marshall and dissent in every single capital case on the grounds that capital punishment is always cruel and unusual. Who can blame them? Hope springs eternal, especially in the due process of law arena.²⁷⁶

XIII. DUE PROCESS OF LAW TODAY: ALL SAIL AND NO ANCHOR

But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

Chief Justice Marshall²⁷⁷

The game of constitutional due process allows the Supreme Court, under evolving values and rights, to "review" practically any subject of life, liberty or property that any four Justices choose from among many thousands of subjects each term. Justices need give no reason why they hear one decision on *Miranda* this term and five the next term, or why they should hear no

272. *Id.* at 256 (Douglas, J., concurring).

273. *Id.* at 310, (Stewart, J., concurring); 313 (White, J., concurring).

274. *Id.* at 380 (Burger, C.J., dissenting).

275. *Id.* at 405 (Burger, C.J., dissenting); 408 Blackmun, J., concurring); 414 (Powell, J., dissenting). *Furman* has been watered down to the point of disappearance. See *McCleskey v. Kemp*, 55 U.S.L.W. 4537 (1987) (rejecting black-white statistical variants in capital context).

276. In *Ford v. Wainwright*, 106 S. Ct. 2595 (1986), a 5-4 Court held that the eighth amendment bars the execution of a prisoner who is insane. Justice Powell wrote in his concurring opinion:

The Court holds today that the Eighth Amendment bars execution of a category of defendants defined by their mental state. The bounds of that category are necessarily governed by federal constitutional law. I therefore turn to the same sources that give rise to the substantive right to determine its precise definition: chiefly, our common-law heritage and the modern practices of the States, which are indicative of our "evolving standards of decency."

Id. at 2607. This, of course, is pure due process.

277. *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

cases at all on the subject.²⁷⁸ Due process is accountable to no one. After a case or controversy exists, the only ironclad internal restraints on the Court are a ban on deciding moot questions and a disinclination to decide questions deemed "political."²⁷⁹

The player of the due process game is anyone willing to stake the contest or appear as a friend of the court (*amicus curiae*). The player is someone unhappy with a rule or law enacted by a state, federal or city government. The player must pay filing fees and/or be willing to appeal or intervene on appeal. Today most of the players on the main stage in oral argument before the Supreme Court are lobbyists. The players have no special respect for the founding fathers' original intent or the fact that the exact question has been repeatedly decided adversely to their side by many previous Supreme Courts. Why should they? Due process is not static. As Mr. Justice Douglas once expressed: "[H]appily, all constitutional questions are always open."²⁸⁰

Today, federal district court judges, by benefit of section 1983 of title 42 of the United States Code,²⁸¹ possess declaratory, injunctive and ancillary jurisdiction to award damages for the denial of constitutional rights by states, cities or towns.²⁸² Federal district court judges had, in the original

278. A candid Justice Frankfurter put it this way in 1950:

This Court now declines to review the decision of the Maryland Court of Appeals. The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter "of sound judicial discretion."

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917 (1950).

279. See, e.g., *Luftig v. McNamara*, 373 F.2d 664 (1967), *cert. denied sub nom. Mora v. McNamara*, 389 U.S. 934 (1967). But see *Baker v. Carr*, 369 U.S. 186 (1962), where local political elections under state law were replaced with a fourteenth amendment, one man, one vote national standard, policed today by federal district court judges.

280. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963) (Douglas, J., concurring).

281. 42 U.S.C. § 1983 (Supp. 1981). Five civil rights acts were enacted immediately after the Civil War to give blacks the right to contract, own property, give evidence and enjoy equality of rights under the new amendment. They were drafted under congressional power to enforce the fourteenth amendment. The most important of the statutes at the district court level was 42 U.S.C. § 1983 (derived from the Ku Klux Klan Act, 1871):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceeding for redress.

Id. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court construed § 1983 to cover any deprivation of rights incorporated by constitutional due process of law.

282. See *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977). Municipalities and other legal government units are "persons" that can be sued directly under 42 U.S.C. § 1983 for monetary, declaratory, or injunctive relief where alleged unconstitutional action has been executed under color of state law. *Monroe v. Pape*, 365 U.S. 167 (1961), to the extent that it holds that local governments are wholly immune from § 1983 suits,

scheme of things, no power to create general common law.²⁸³ That is all changed today. Section 1983 may be used to declare, change, award, enjoin or punish any violation of liberty, property, life or procedure found in the Bill of Rights as discovered by the reconditioned section 1983.²⁸⁴ When *Monroe v. Pape*²⁸⁵ was decided, there were only a few hundred civil rights suits. By 1984, the figure was over 25,000.²⁸⁶ The United States Supreme Court has lately made efforts to stem the tide of section 1983 district court filings by limiting injunctive relief,²⁸⁷ restricting it to actions under color of state law,²⁸⁸ expanding immunity for states²⁸⁹ or disparaging the abstract value or importance of the constitutional right involved.²⁹⁰

In the land of remedies, the Court is gradually sinking into the abyss of distinguishing preferred from plain rights, or liberty from property interests.²⁹¹ This amounts to an exercise in raw value selection. In *Parratt v.*

has been overruled. See *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985); *Monell v. Department of Social Servs. of the City of New York*, 436 U.S. 658 (1978).

283. See Graglia, *supra* note 92, at 441.

284. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental health); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare due process); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (loyalty oaths); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (apportionment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (extending counsel); *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment). See also Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 145 (1961):

If a party is treated unfairly by a sheriff, county clerk, building inspector, or even by the state public welfare office, he may seek relief in a federal court. Under section 1983, a federal judge has the power to decide that the warden of a state prison should not censor a prisoner's mail, or that a liquor license should be granted to one applicant rather than to another. He may even review the conduct of litigation in state courts, as where it is alleged that a state judge made, or is about to make, an error of law or fact which denied, or will deny, the plaintiff due process.

Id. at 170-71 (footnotes omitted).

285. 365 U.S. 167 (1961).

286. See Note, *Is the Section 1983 Civil Rights Statute Overworked? Expanded Use of Magistrates—An Alternative to Exhaustion*, 17 U. MICH. J.L. REF. 361 (1984). See also *Butz v. Economou*, 438 U.S. 478, 526 (1978) (Rehnquist, J., dissenting) (from 1961 to 1977, the number of cases brought in the federal courts under civil rights statutes increased from 296 to 13,113).

287. *O'Shea v. Littleton*, 414 U.S. 488 (1974) (injunctive relief against judicial officers was improper where nature of threatened injury, illegal bond setting, was conjectural).

288. *Polk County v. Dodson*, 454 U.S. 312 (1981) (official activities of a public defender not "under color of state law").

289. *Davis v. Scherer*, 468 U.S. 183 (1984) (plaintiff who seeks damages for violation of constitutional or statutory rights may overcome official's qualified immunity only by showing that those rights were clearly established at time of conduct in issue); *Quern v. Jordan*, 440 U.S. 332 (1979) (state not liable for retroactive payment of welfare benefits).

290. *Memphis Community School Dist. v. Stachura*, 106 S. Ct. 2537 (1986) (school suspension case alleging violations of due process and the first amendment).

291. See *Daniels v. Williams*, 106 S. Ct. 662 (1986) (due process losses caused by negligence are not actionable under § 1983); *Hudson v. Palmer*, 468 U.S. 517 (1984) (intentional destruction

Taylor,²⁹² the Court determined that section 1983 remedial relief does not extend to those rights protected merely by the due process clause of the fourteenth amendment. The *Taylor* plurality held:

The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." . . . Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter*.²⁹³

Without the due process *simpliciter* construction, of course, none of the Bill of Rights would be applicable to state and local government in the first place. Perhaps it is time to sound the tocsin to end a rootless due process by proposing a constitutional amendment to restore the phrase to its original meaning.

XIV. A CASE FOR A CONSTITUTIONAL AMENDMENT TO DEFINE DUE PROCESS OF LAW

[T]he ultimate justification for nullifying or saying that what Congress did, what the President did, [or what the state legislatures] did was beyond its power, is that provision of the Constitution which protects liberty against infringement without due process of law. There are times, I can assure you—more times than once or twice—when I sit in this chair and wonder whether that isn't too great a power to give to any nine men, no matter how wise, how well disciplined, how disinterested. It covers the whole gamut of political, social, and economic activities.

Justice Frankfurter²⁹⁴

The founding fathers rejected a supreme council of revision to veto or improve the laws of Congress or the states.²⁹⁵ Yet, the Supreme Court's construction of the due process clause has created a committee of unelected judges with immense powers to determine the nature and quality of American life. The coup d'état of 1890, which provided the Court with the power to review for reasonableness all subjects touching life, liberty or property, left due process benchless and bereft of precedent or guidelines. Every Supreme Court since 1890 has been victimized into finding something more to the

of prisoner's property during shakedown search does not violate due process clause of the fourteenth amendment where there are adequate past deprivation remedies at state law); Moore, Parratt, *Liberty, and the Devolution of Due Process: A Time for Reflection*, 13 W. ST. U.L. REV. 201, 221 n.174 (1985).

292. 451 U.S. 527 (1981).

293. *Id.* at 536.

294. F. FRANKFURTER, *OF LAW AND LIFE AND OTHER THINGS THAT MATTER* 129 (P. Kurland ed. 1965).

295. See *supra* note 67 and accompanying text.

clause. This enduring, chaotic process has made the phrase nearly void for vagueness.

The author proposes the following amendment to the United States Constitution in an attempt to restore the original meaning to the phrase "due process of the law." Due process of law, when used in the Constitution, shall refer to procedures according to the laws of Congress or the states. Equal protection of the law shall refer to state law. Under this amendment, the fifth and fourteenth amendment will become hinged to state or federal law as originally intended.

PROPOSED AMENDMENT TO THE CONSTITUTION:

DUE PROCESS OF LAW WHEN USED IN THIS CONSTITUTION SHALL REFER TO PROCEDURES ONLY, ACCORDING TO THE LAWS OF CONGRESS OR THE STATES, RESPECTIVELY. EQUAL PROTECTION OF THE LAWS SHALL REFER TO STATE LAW. THIS AMENDMENT SHALL NOT OTHERWISE BE CONSTRUED TO DENY OR ABRIDGE IN FEDERAL COURTS, RIGHTS PROVIDED BY AMENDMENTS I TO VIII.

With this proposed amendment, the fifth and fourteenth amendment due process phrases will apply to federal or state law as originally intended. Due process will become procedural only and amenable to direction by Congress or the states.²⁹⁶

296. This amendment would allow the Court, using its rulemaking power, to enact interim federal procedures. These procedures would be amendable by Congress in the same fashion that federal criminal law decisions of the Supreme Court today can be reviewed, revised, vetoed or overruled by an act of Congress. The first, fourth, fifth and sixth amendment procedures would remain inviolate in federal proceedings.

Many state constitutions use the phrase "due process." In those states, judges could set out common judge-made rules of due process in criminal and civil matters, but legislation overriding the judges is also due process and entitled to supremacy. *See generally* Corwin, *supra* note 30. Indeed many statutes remedy defects in the common law as they are developed. *See* *Munn v. Illinois*, 94 U.S. 113 (1876).

The amendment would abolish a uniform fifty-state Supreme Court-enacted procedure. Instead, each state could determine procedures under state law for itself and its citizens. This is wholly consistent with the letter and intent of the phrase in the fourteenth amendment as used before 1890. Nothing would affect the constitutional requirement that state law be applied evenly on a non-racial basis.

The phrase "equal protection of the laws shall refer to state law" restores the equal protection clause to its original purpose. After 1890, equal protection was construed to forbid unreasonable state law that discriminates generally. A new amendment to define due process would not affect race statutes, *see* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966), or decisions, *see* R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) (*Brown v. Board of Educ.*, 349 U.S. 295 (1955), and its progeny violated the framers' intent to leave the school segregation issues untouched). *See also* Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. (1986) (interpretivism or originalism, which maintains that the provisions of the Constitution mean what the founders intended them to mean, that is, the "original intention," is a view deeply rooted in our history and our formal constitutional law).

Nor would the amendment alter or affect measures sustainable under the commerce clause

The amendment would not change *Marbury v. Madison*,²⁹⁷ supremacy, the commerce clause, review jurisdiction, race law, the pre-emption doctrine or review of the Bill of Rights in federal courts. It would, however, restore the fourteenth amendment to its original understanding and promise of equal law and procedure under state law. The amendment takes away the power of judges to rely on the phrase "due process of law" to veto the exercise of lawmaking powers on the grounds of reasonableness. The phrase "due process" would now include procedures only.

Both equal protection and due process would no longer be free-floating concepts, but instead would be defined and anchored to state and federal law. The selective incorporation doctrine, which retards and stifles state creativity, particularly in the criminal procedure area, would be abolished.

A formal amendment to restore meaning and power to the fourteenth amendment is not really that radical. It mirrors a concern found in the 1920's and 1930's that conservative judges had too much power. There was

power, such as Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment practices based on "race, color, religion, sex, or national origin" when an employer with twenty-five or more employees is "engaged in an industry affecting commerce," defined as one "in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce." 42 U.S.C. § 2000e (1970 & Supp. IX 1974). Thus, commerce clause jurisdiction would exist without the need for fourteenth amendment substantive due process. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (upholding environmental legislation); *United States v. Sullivan*, 332 U.S. 689 (1948) (consumer product safety). See Senate Hearings, Committee on Commerce, 88th Cong., 2d Sess. 51732 at 1, 2 (1963). When Congress exercises a granted power, federal law may supersede state authority, and federal law is entitled to art. VI supremacy. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1959); Note, *Developments in the Law: Federal Limitations on State Taxation of Business*, 75 HARV. L. REV. 953 (1962). Perhaps an amendment would prompt Congress to express intent and occupy through commerce clause jurisdiction, areas now shared or dormant. See Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1960).

The United States Supreme Court would not, however, be able to impose federal standards on matters that are not procedural. These matters include: 1) state voting apportionment, see *Baker v. Carr*, 369 U.S. 186 (1962); see also *Davis v. Bandemer*, 106 S. Ct. 2797 (1986) (plurality review of democratic challenge to Indiana's 1981 appointment representing republican effort at political gerrymandering); 2) gender discrimination, see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (male victim of sex discrimination); 3) prayer, see *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985) (Justice Rehnquist's views on origins of religion clause); 4) capital punishment, see *Greg v. Georgia*, 428 U.S. 153 (1976); Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351 (1984) (Supreme Court, by relying on eighth amendment rather than due process clause in capital punishment cases, has afforded inadequate safeguards from deprivation of life without due process); or 5) abortion, see *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169 (1986) (latest 5-4 opinions on abortion).

An amendment defining due process of law would finally reject the post-1890 notion that due process of law is to be construed to mean what a Court majority at any given period in history wishes it to mean and instead restores the phrase to a modest written document allocating powers to govern and amend or alter laws as our people decide.

297. 5 U.S. (1 Cranch) 137 (1803).

a veritable flood of proposals in Congress to curtail the United States Supreme Court, which was using due process to strike down economic laws.²⁹⁸ Dean Clark of Yale Law School also proposed that due process refer only to administrative or judicial procedure.²⁹⁹ Senator Borah of Idaho developed a similar proposal.³⁰⁰ As Thomas Jefferson stated, "In questions of power let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."³⁰¹

298. One proposal read, "No court shall have the power to set aside as unconstitutional any law passed by Congress or the United States." S.J. Res. 3, 74th Congress, 1st. Sess. (1936). *Accord*, Note, *Shall Due Process of Law be Abolished*, *supra* note 127.

299. See Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313, 323 (1936).

300. *Id.* at 326 n.47. "Due process of law provisions of the 5th and 14th amendments to this Constitution shall have reference only to the requirements that every person in any manner aggrieved by an act of another shall be entitled to a fair and impartial trial or hearing and adjudication of his grievance according to the recognized processes of law." *Id.*

301. See H. MENCKEN, *supra* note 25, at 213.

APPENDIX

The author presents a comparative note to illustrate the due process differences between a Supreme Court Justice and elected lawmakers.

	SUPREME COURT JUSTICE	STATE OR FEDERAL LEGISLATOR
Vesting Process	President's nomination and Senate vote	Public vote every term
Platform	Senate hearings prior to approval	Public avowals before election, legislative voting record afterwards
Inventory	A few thousand <i>certiorari</i> options a term	Open
Lawmaking Visibility Level	Cases, written briefs and oral arguments; activist <i>amicus curiae</i> ; law clerks, and the man himself	Legislative process: self-interest, public pressure, lobbies, law reviews, committees
Change of Law	Cases appealing to disobedience of prior law	Platform election, majority vote and non-exercise or overriding an executive veto
Term	Life	Two to six years at a time
Recall	Senate impeachment	Voters' choice
Predictable Term of Service	None	One term at a time
Voting Number	An effective vote of 5 to 9	Many hundreds of elected representatives

